Supreme Court, U.S.
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No. 07-991

IN THE

Supreme Court of the United States

DAVIDSON MOMAH, PETITIONER

v.

CARI M. DOMINGUEZ, CHAIR, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer may be held liable for race and national origin discrimination under Title VII of the Civil Rights act of 1964, as amended, for denial of a hardship transfer to any position which the Respondent routinely grants to employees that resulted in significant travel expenses, significantly affected a legal obligation imposed by a four judge panel of the Oakland County court, loss of salary, leave, positions, within-grade-increases, locality pay, geographical location or cause tangible effect to terms, conditions, and privileges of employment?

2. Whether the Court should vacate the judgment of the Sixth Circuit Court of Appeals because it followed the standard set forth in its decision in *Walborn v. Erie County Care Facility*, 150 F. 3d 584, 589 (6th Cir. 1998) rather than following the standard set forth by this honorable Court in *Burlington Northern Santa Fe Railway v. Sheila White*, 126 S.Ct. 2405 (2006), *Mt. Health City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Wilkie, et al., v. Robbins*, 127 S.Ct. 2588 (2007); and *Clark County School District v. Shirley A. Breeden*, 121 S.Ct. 1508 (2001), in evaluating retaliation claims (denial of hardship transfer, denial of promotions, failure to hire, placed on AWOL, and hostile work environment in Indianapolis) as directed by this Court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 19

CONCLUSION 34

APPENDIX

APPENDIX A Panel's Order denying request for en banc hearing. 1a
APPENDIX B Judgment of a three judge panel of the Sixth Circuit Court of Appeals reaffirming the district court summary judgment 3a
APPENDIX C Supreme Court's Order vacating the judgment of the panel 28a
APPENDIX D Panel's order denying petition for a rehearing 29a
APPENDIX E Judgment of a three judge panel of the Sixth Circuit Court of Appeals affirming the district court summary judgment 30a
APPENDIX F District Court Order Denying Motion For Reconsideration 54a
APPENDIX G Order Granting Defendant's Motion For Summary Judgment 56a

APPENDIX H District Court's Bench decision on Summary Judgment 57a
APPENDIX I Judge Audrey Scott's Answer to EEO Inv. Questionnaire..... 75a
APPENDIX J Judge Audrey Scott's June 25, 2003 Deposition. IN THE MATTER OF: Momah v. Carl M. Dominguez, Chair..... 90a
APPENDIX K Mr. James R. Neely's Deposition on April 22, 2003. IN THE MATTER OF: Momah v. Carl M. Dominguez, Chair..... 91a
APPENDIX L Respondent's Transfer of cases to other districts at the time it claimed low inventory as a reason for denial of a hardship transfer..... 94a
APPENDIX M Conservatorship Appointment by four a panel judge of the Oakland County Court 95a

TABLE OF AUTHORITIES

Page

CASES

BURLINGTON NORTHERN SANTA FE RAILWAY CO., V. WHITE, 548 U.S.__(2006) ..... *passim*
BOYKIN V. CITY OF MOBILE, 1998 WL 34169127 (C. A. 11) 24
BOUMAN V. BLOCK, 940 F.2D 1211 (9TH CIR.), CERT. DENIED, 502 U.S. 1005(1991) 21
BARRETT V. LUCENT TECHNOLOGIES, INC. 36 FED. APPX. 835, 842, 2002 WL 1272116 (6TH JUNE 6, 2002.) 20
CLARK COUNTY SCHOOL DISTRICT V. SHIRLEY A. BREEDEN, 121 S.CT. 1508 (2001). 27,28,30
COOPER V. CITY OF NORTH OLMSTED, 796 F. 2D 1265, 1272 (6TH CIR. 1986) 28
KOCSIS V. MULTI-CARE MGMT,. INC., 97 F. 3D 876 (6TH CIR. 1999) 20
LEDERGERGER V STANGLER, 122 F.3D 1142 (8TH CIR. 1997) 21
MATTERN V EASTMAN KODAK CO., 104 F. 3D 702 (5TH CIR. 1997) 24
MT. HEALTH CITY SCHOOL DISTRICT BOARD OF EDUCATION V. DOYLE, 429 U.S. 274 (1977) 29
NATIONAL RAILROAD V MORGAN, 536 U.S. 101 (2002) 30
PARKER V STATE OF DEL., DEPT. OF PUBLIC SAFETY, 11 F. SUPP 2D 467 (D.DEL. 1998) 23
RANDLETT V. SHALALA, 118 F.3D 857(1ST CIR. 1997) .. 21,22,23
RUGGLES V. CALIFORNIA POLYTECHNIC STATE UNIVERSITY, 797 F.2D 782 (9TH CIR. 1986) 22
RANDLE V. LASALLE TELECOM, INC., 876 F.2D 563(7TH CIR. 1989) 21,22
VON GUNTEN V. MARYLAND, 243 F. 3D 858 (4TH CIR. 2001) 24
WILLIAMS V. BRISTOL-MYERS SQUIBB CO., 85 F. 3D 270 (7TH CIR. 1996) 24
WILKIE, ET AL., V. ROBBINS 127 S.CT. 2588 (2007) 29

WALBORN V. ERIE COUNTY CARE FACILITY 150 F. 3D 584, 589 (6TH CIR. 1998) 27

STATUTES & RULES

28 U.S. C. Section 1254(1) 2
Civil Rights Act of 1964 as amended

A. Section703 2,25
B. Section704 2

PETITION FOR A WRIT OF CERTIORARI

Mr. Davidson Momah (hereinafter Petitioner or Petitioner Momah) respectfully requests that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on June 21, 2007.

OPINIONS BELOW

The order of the United States District Court for the Eastern District of Michigan granting Respondent's motion for summary judgment is unreported, and is reproduced at Pet. App. G and H. Following the district court's decision, that court further denied motion for reconsideration of its decision. The decision is unreported and it is reproduced at Pet. App. F. The initial decision of the Sixth Circuit Court of Appeals affirming the district court's decision is an unpublished decision and is reproduced at Pet. App. E. Following that decision, the Sixth Circuit Court of Appeals further denied a petition and amended petition for a rehearing in an unpublished order that is reproduced at Pet. App. D. On January 8, 2007, the United States Supreme Court vacated the decision of the Sixth Circuit Court of Appeals, and remanded it for further consideration, and it is reproduced at Pet. App. C. Following the United States Supreme Court decision, the Sixth Circuit Court of Appeals issued another decision reaffirming the district court's decision. It is an unpublished decision, and it is reproduced at Pet. App. B. Subsequently, the Sixth Circuit Court of Appeals issued an order denying request for an en banc hearing, and it is reproduced at Pet. App. A.

JURISDICTION

On June 21, 2007, the Sixth Circuit Court of Appeals entered another decision reaffirming the decision of the District Court. (Pet. App.B). On July 31, 2007, the Petitioner requested an en banc hearing by the full court. On September 27, 2007, the original panel issued an order denying the petition for en banc hearing. (Pet. App. A). On December 5, 2007, the Court granted an extension of time to file writ of certiorari to January 25, 2008. Therefore, this Court has jurisdiction pursuant to 28 U.S. C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

(See appendix N)

STATEMENT

The decision below is among the latest conflict in the lower courts as to what constitutes an adverse employment action and the intent of Congress when it enacted Sections 703 of Title VII of the Civil Rights Act of 1964, amended.

This case further presents the issue of whether the decision of the Sixth Circuit Court of Appeals is in harmony with the standard set forth by the Court in *Burlington Northern*, 120 S.Ct. at 2415; *Clark County School District*, 121 S.Ct at 1511; *and Mt. Health City School District Board of Education*, 429 U.S. at 286 in determining retaliatory discrimination under Section 704 of Title VII of the Civil Rights Act of 1964, amended.

Petitioner Momah, a black African male, desperately sought a hardship transfer to the

Respondent's Detroit District Office after learning that his young child had been diagnosed with scoliosis and needed major medical intervention, as well as to carry out conservatorship duties imposed on him by the Oakland county court. (Pet. App. B, p. 5a & M, p. 94a). Though a hardship transfer is part of the Respondent's policy and practice, Petitioner Momah's repeated requests for hardship transfer were all denied, then turned into a nightmare involving a **complex web of deceit, lies/falsehoods, and retaliation**. (Pet. App. B, p. 9, 11a-12a, 26a & L, 91a-93a).

Petitioner Momah maintains that the Respondent's scheme to deny him a hardship transfer to Detroit was due to his black race and his African national origin. Petitioner Momah also maintains that the Respondent attempted to silence his vehement protests by engaging in various acts of intense retaliatory conduct which included denial of selection to all the positions the Petitioner applied for, denial of transfer requests, denial of promotions, subjected to hostile work environment, among other events.

On August 30, 2002, the Petitioner filed an action in the United States District Court. On October 20, 2003, the district court issued a judgment dismissing the Petitioner's entire claims including those that the Respondent refused to investigate. (Pet. App. H). On March 15, 2006, this decision was affirmed by the Sixth Circuit. The Sixth Circuit held that there is no cause of action for denial of a hardship transfer to a purely lateral position under Title VII. In addition, the Sixth Circuit affirmed the dismissal of all the claims that the Respondent intentionally did not investigate which were not related to the original complaint. (Pet. App. E).

On January 8, 2007, this Court vacated the

opinions of the District Court and the Sixth Circuit. In vacating the decisions, this court ordered the Sixth Circuit of Appeals to evaluate the Petitioner's claims in light of its decision in *Burlington Northern*. (Pet. App. C). On June 21, 2007, the panel merely changed the word "objective to reasonable" in its footnote but did not follow this Court's analysis in *Burlington Northern* in reaffirming the district court's dismissal of all of the Petitioner's complaints. (Pet. App. B). It is unclear the burden of proof standard the Sixth Circuit relied on when it dismissed even those subsequent claims that were not related to the original claims.

Surprisingly and without notice, the Sixth Circuit ruled for the **first time** following this Court's remand that the retaliation claims must fail for lack of causation because Petitioner Momah's hardship transfer requests were denied prior to the actual filing of EEO complaint in October 13, 1999, and the denial continued after the filing of the complaint. However, the Sixth Circuit failed to acknowledge subsequent retaliatory acts that were not related to the original complaints which were not investigated. (Pet. App. B, 24a-25a).

The Sixth Circuit relied on its prior decision in *Walborn* which requires direct evidence linking adverse employment action to prior EEO activity instead of this Court's well reasoned analysis in *Burlington Northern*, *Clark County School District* (Proximity Test), *Mt. Health City School District Board of Education* and *Wilkie* (Substantial or motivating factor test) in the absence of direct evidence. The result may be to undermine this Court's well reasoned and crafted jurisprudence in the above cited cases.

SUMMARY OF THE ALLEGATIONS

Petitioner Momah, a black African male, began his employment with the Respondent as an Investigator on April 4, 1994, in Detroit, Michigan. (Pet. App. B, p 4a). The Petitioner was a conscientious and dedicated employee, as attested to by his significant performance rating and numerous performance awards. [1] (Pet. App. B, p. 5a). In or about February 1997, Petitioner Momah applied for an Administrative Judge (AJ) position in the Respondent's Memphis Tennessee EEOC office. In April 1997, Chief Judge Audrey Scott selected Petitioner Momah as an AJ. (Pet. App. B, p.5a). Judge Scott testified that the selection and promotion of Petitioner Momah to an AJ position was based upon his merit, past performances, and excellent recommendation from the managers in the Respondent's Detroit District Office. (Pet. App. J, p. 79a-80a).

Petitioner Momah's family remained in Detroit when he relocated to Memphis. His family planned to relocate to Memphis, but his wife could not secure employment in the Memphis area. (Pet. App. B, p. 5a). Within the year of relocating to Memphis, Petitioner Momah's daughter fractured her leg. Later she was diagnosed with scoliosis and required major medical intervention and treatment. (Pet. App. B, p. 5a). Soon thereafter, Petitioner Momah was physically assaulted at a gas station by a white supremacist, who uttered racial slurs before fleeing, leaving Petitioner Momah

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[1].In 1994 thru 1997, Petitioner was honored as a recipient of the "Director's award", a pen, bronze plaque, a $75.00 gift certificate and a framed certificate, among other awards. (Pet. App. J, 79a-80a).

hospitalized. The attack also resulted in his wife's refusal to move to Memphis. (Pet. App. B p. 5a). To boot, Petitioner Momah's sister was diagnosed with cancer and became terminally ill. Petitioner Momah became a surrogate father to his young niece in Cleveland, Ohio. Constant weekend trips (driving and flying) to Memphis, Detroit, Cleveland and Indianapolis took a devastating toll on Petitioner Momah's physical and emotional health.

In early January of 1998, Petitioner Momah visited the Detroit Office and spoke to the management officials including former District Director James Neely, Jr. requesting a return to Detroit. (Pet. App. B p. 5a). Mr. Neely indicated that he would like to bring the Petitioner back, but did not have the authority to do so. He asked Petitioner Momah to contact Godfrey Dudley, former Director of Field Management Programs. On Mr. Neely's advice, Petitioner Momah sent a letter dated January 13, 1998, to Mr. Dudley requesting a hardship transfer to the then vacant AJ position in Detroit. (Pet. App. B p. 5a). Mr. Ralph Soto, Program Analyst, Field Management Program Office, responded on behalf of Godfrey Dudley. Before responding to the letter, Mr. Soto called Mr. Grabon to discuss Petitioner Momah's request. Mr. Grabon told him to deny the request for now. (Pet. App. B p. 6a).

On February 3, 1998, Mr. Soto responded to Petitioner Momah's January 1998 letter. In his letter, Mr. Soto advised Petitioner Momah that his hardship transfer request would not be granted at this time due to the "current workload and staffing levels in the Memphis District Office."(MDO). The letter further stated that the EEOC "will be happy to reconsider your transfer request if there is a change in the MDO's workload and staffing situation." (Pet. App. B p. 6a).

Shortly after the above letter, Petitioner Momah met with Mr. Grabon who told Petitioner Momah that his transfer request could not be approved due to the high inventory in Memphis. He asked Petitioner Momah to give him at least six months, as well as to reduce the backlog before he would approve the hardship transfer. (Pet. App. B p. 6a). Petitioner Momah contacted Mr. James Miller, former Director of Investigation, EEOC. A formal complaint was not filed because Mr. Miller advised Petitioner Momah against filing reasoning that Petitioner Momah did not have a comparator. After Petitioner Momah had reduced the inventory and the staff's needs in Memphis had improved, Petitioner Momah again met with Mr. Grabon and showed him a second letter pleading to be transferred to Detroit. **Mr. Grabon told the Petitioner that his request would not be approved because he wanted Petitioner Momah to assist Judge Kimmelman, a white female, over Petitioner Momah's objective as another condition for his transfer.**[2] **Petitioner Momah reminded Mr. Grabon that he had never required of the same from prior hardship Caucasian employees whom he assisted in their hardship requests**. (Pet. App. B, 6a-7a). However, he told Petitioner Momah to speak directly to Mr. Soto about his hardship transfer request.(Pet. App. B p. 6a-7a). As a result, Petitioner Momah flew to Washington, D.C. and met with Mr. Soto in person to discuss his hardship transfer request. Petitioner Momah advised Mr. Soto that he was not only requesting a hardship lateral transfer, but that he would take a temporary detail in Detroit, to any

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[2]Petitioner Momah was assisting Judge Kimmelman during the period in question prior to Mr. Grabon's order.

position including an investigator. (Pet. App. B p. 7a). Petitioner Momah even stated to Mr. Soto that he would personally bear all expenses associated with his transfer or detail move. Petitioner Momah further suggested that he could take his cases in Memphis to Detroit, something that the Respondent had often authorized in the past. Mr. Soto rejected all the suggestions. (Pet. App. B, p.7a-8a). Mr. Soto told Petitioner Momah that he could not transfer to Detroit now because of low inventory in Detroit.

Petitioner Momah lodged a discrimination complaint with Ms. Elizabeth Thornton, the Director of Field Programs of EEOC, Mr. Paul Igasaki, the Vice Chair of EEOC, and Mr. Paul Miller, the Commissioner of EEOC, and Mr. James Miller. (Pet. App. B, p.8a). Shortly after the complaint in Washington, D.C., Mr. Miller, Vice Chair Igasaki, and Commissioner Miller questioned Mr. Soto and Ms. Thornton concerning Petitioner Momah's complaint.

Mr. Soto and Ms. Thornton stated that a low inventory was the reason for the denial of the hardship transfer request. Following the questioning, Mr. Soto became very upset and called Mr. Grabon to tell him of Petitioner Momah's visit to the Headquarters and the complaint concerning the denial of his transfer request. Mr. Grabon was very upset with Petitioner Momah. Mr. Grabon called his secretary, Ms. Jackie Statterfield, to find out if the Petitioner took an annual leave to travel to Washington D.C. Ms. Statterfield told him that Petitioner was on leave.

Following Petitioner Momah's EEO complaints in Washington in August against Mr. Grabon, Ms. Soto, and Ms. Thornton, the Petitioner's hardship request was formally denied for the **first time** on September 8, 1998, allegedly by Mr. Neely. (Pet. App. B, p.8a). In

denying the request, Mr. Neely stated that "it will not be possible to grant your request for reassignment at this time...," and that the request was "not commensurate with the district's needs." (Pet. App. B, p.8a). Petitioner Momah contacted Mr. Miller and filed an EEO complaint. Again, Ms. Thornton and Mr. Soto were questioned concerning the above letter, but no formal complaint was filed based on Mr. Miller's counseling. In October 1998, Petitioner Momah contacted Mr. Soto, as well as, met Mr. Neely, in order to find other means of transferring to Detroit. Mr. Soto angrily told Petitioner Momah " **you are not going to Detroit**." (Pet. App. B, p.8a-9a).

Petitioner Momah also met with Mr. Grabon. The Petitioner advised Mr Grabon that he is blaming Mr. Grabon for his transfer predicament, and that he had contacted the EEO office and would pursue an EEO complaint against him and Mr. Soto. Mr. Grabon advised Petitioner Momah that Mr. Soto told him about the EEO complaint. Mr. Gabon advised against it, and cautioned Petitioner Momah by stating that "**filing an EEO complaint is like falling off the wagon.**" Ms. Staffield was a witness to the above comments. Also, the Respondent is aware that this comment was indeed made.

Meanwhile in the same October 1998, both the Petitioner and Judge Kimmelman were under Judge Scott's supervision. (Pet. App. I, p. 75a-76a). Prior to the end of the year, Judge Scott became ill and was placed on medical leave. Mr. Grabon promoted Judge Kimmelman event though she was not due for promotion. (Pet. App. I, p. 75a , &76a). He then advised Petitioner Momah whose promotion was due in November 1998, to wait for Judge Scott to promote him when she returns from her medical leave. (Pet. App. I,

p. 75a-76a & J, p. 80a-84a). In addition, during that period, Petitioner Momah's outstanding performance ratings in all the categories but one, were lowered, while Judge Kimmelman who had performance deficiencies received outstanding ratings in all the categories. (Pet. App. I, p. 76a).

The Petitioner initiated contact by calling Mr. James Miller, but he was unavailable.[3] Consequently, Petitioner contacted the EEO secretary who referred the matter to Ms. Vanessa Williams, the then Acting Director for Mediation. Ms. Williams referred the matter to a Mediator, Ms. Johnson. The mediation lasted for several months because Mr. Grabon requested for extra time. While the mediation was in process, Ms. Johnson retired without informing the Petitioner.

In August 1999, the Petitioner met with Ms. Jacqueline Bradley, the new Director of Field Management, and Mr. Soto's supervisor, and requested another hardship transfer. Ms. Bradley stated to Petitioner Momah that Mr. Neely allegedly said, **for the very first, that he does not want Petitioner Momah back because "they had problems with him when he was in Detroit**." (Pet. App. B, p. 8a). This was obviously different from what Mr. Neely had stated to the Petitioner before Petitioner filed the EEO complaints. Judge Audrey Scott, the Chief AJ of Memphis District, testified that at the time she recommended Petitioner Momah for the AJ position, she spoke to the Detroit Office, and no one in Detroit stated that Petitioner Momah had any problems in

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[3]Mr. Miller later returned Petitioner Momah's call and advised him that he was out of town due to his mother's illness and subsequent death.

Detroit. (See Pet. App. J, p, 78-79a). Mr. Miller and Petitioner Momah's EEO Representative, Attorney Johnnie Johnson advised the Petitioner of this new allegation by Mr. Soto, Mr. Neely, and Mr. Grabon. This allegation was obviously not stated in February 1998 as a reason for denying Petitioner Momah's hardship request. On September 11 and 24, 1999 and October 2 1999, Petitioner Momah repeatedly requested a hardship transfer. He was denied by Ms. Bradley and Ms. Thornton for lack of funded position which was yet another different reason for denial. (Pet. App. B, p. 9a). Later, Petitioner Momah discovered that the reasons Mr. Soto and Ms. Thornton gave were false. The record shows that during the period in question, Detroit had a huge backlog and was in fact sending cases to Cleveland, Milwaukee, and later to Indianapolis Districts. (Pet. App. L, p.91a-93a).

In late September 1999, Mr. Dan Dushman who had documented performance problems was granted a transfer back to Detroit. (Pet. App. B, p.9a). In his letter for a hardship transfer, Mr. Dushman acknowledged that he was having considerable problems with his work performance in Albuquerque, and that his supervisor was unhappy with his work. Mr. Dushman was permitted to return to Detroit to an investigator position, even though he had been demoted while working in Detroit due to performance problems. (Pet. App. B, 9a).

Ironically, at the time both Petitioner Momah and Mr. Dushman requested a hardship transfer, there was no vacant Investigator's position. An authorization to file was permitted for Mr. Dushman. (Pet. App. B, 9a). However, at that time, there was a vacant AJ position. **A hardship transfer does not require that the position in the receiving office be funded,**

as long as there is a funded position in the sending office.

Importantly, in an e-mail to Mr. Neely, **Judge Mimi Gendreau advised Mr. Neely that "it was wrong to leave the AJ position vacant even if he did not want Petitioner Momah to get the position."**

On October 13, 1999, Petitioner Momah filed another informal EEO complaint against Mr. Neely, Mr. Grabon, Mr. Soto, and Ms Thornton. On or about November 1999 Petitioner Momah filed a formal complaint. (Pet. App. B, p. 10a). Within four weeks of filing a formal EEO complaint in 1999 naming Mr. Neely, Mr. Neely began the process of granting Ms. Barno a hardship detail/transfer to the very vacant AJ position he allegedly could not fill for lack of funding or low inventory. (Pet. App. B, p. 10a & 11a). At the time Ms. Barno was granted a transfer, she was under a disciplinary action for work misconduct. By the end of January 2000, Ms. Barno was an AJ in Detroit.

Upon learning of Ms. Barno's transfer, Petitioner Momah filed an amendment to his EEO complaint. Mr. Miller accepted the complaint after he contacted Mr. Neely, Mr. Soto, and Mr. Thornton to confirm the above allegation. In addition to Ms. Barno and Mr. Dushman's transfers to the Detroit office, Ms. Tina Hoffman, a Caucasian female, who had resigned as a budget analyst in the midst of serious problems, was permitted to return to the Detroit office. Ms. Linda Sankovich, a Caucasian female, who had earlier transferred to Washington D.C. was allowed to return to the Detroit office, but to a different position than the one she previously held in Detroit, because her partner refused to relocate to Washington, D.C. Ms. Judith Fournalik, a Caucasian female, was granted a transfer

to the Detroit District Office to attend law school. (Pet. App. B, p.11a). **Significantly, all the Caucasian judges with no prior EEO complaints who requested hardship transfer where granted transfer to their intended hardship destination between 2000 and 2001.**

While all these were going on, in November 1999, Judge Scott referred Petitioner Momah for promotion. Mr. Grabon refused to promote Petitioner Momah. (Pet. App. I, p. 76a & J, 85a-86a). Mr. Grabon through Ms. Minnie Johnson stated that the Petitioner Momah had to wait for one year from his last promotion. (Pet. App. I, p.75a & J, p. 84a). Judge Scott and Ms. Rose Wheeler, Personnel Technician, advised Mr. Grabon that Petitioner Momah was not required to wait for one year since he was in a different promotion category. (Pet. App. I, p.75a & J, p. 84a). Besides, Judge Kimmelman who was in the same promotion category as the Petitioner was promoted in less than one year even though she was not due for a promotion. (Pet. App. I, p. 77a-78a & J, p. 83a).

SUBSEQUENT COMPLAINTS

Shortly after the above EEO complaints were filed, several events occurred for which Petitioner Momah initiated new EEO complaints. The new complaints which were not related to the original complaint were not investigated as required by the regulations, in spite of Petitioner Momah's several attempts to have these claims investigated. The new claims were as follows:

1. TRANSFER TO INDIANAPOLIS[4]

Shortly after Mr. James Miller spoke to Mr. Neely, Mr. Soto, Ms. Bradley, and Ms. Thornton concerning the transfer/detail of Ms. Barno, in or about February 2000, Petitioner Momah was **lured** into going to Indianapolis under a false promise that he would be transferred to Detroit if a funded position became available, and that Indianapolis was just to accommodate his needs at the time. Petitioner Momah accepted the transfer to Indianapolis without knowing that the offer was to get him out of Judge Scott's protection. In April of 2000, the Petitioner formally transferred to the Indianapolis District Office.

Unfortunately, the transfer to Indianapolis was not an attempt to place him closer to his family in Detroit, but to retaliate against Petitioner Momah for filing EEO complaints. Upon his arrival in Indianapolis, Ms. Laura Young, a supervisor, and close friend of Mr. Neely, and Judge Tammy Whitaker, another supervisor, and a close friend of Judge Mimi Gendreau, advised Petitioner Momah that Mr. Grabon, Mr. Neely, Ms. Soto, and Judge Gendreau called them concerning Petitioner Momah and his EEO complaints. Within days of the above discussion, Petitioner Momah overheard Ms. Young and Mr. Neely discussing

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[4].The panel incorrectly stated that "a disagreement erupted between Petitioner Momah and EEOC Headquarters over who would bear the cost of relocation." (Pet. App. B, p. 13a). There was no discussion between Petitioner Momah and EEOC Headquarters as noted by the panel. Any discussion concerning a transfer occurred between Petitioner Momah and Ms. Woods in Memphis. The transfer did not take place because during the discussion, Ms. Woods began to comment on the merit of the pending EEO matter, and that the Petitioner would not prevail.

Petitioner Momah during which Ms. Young advised Mr. Neely "don't worry everything is taken care off." Shortly thereafter, Petitioner Momah was subjected to what could be described as "a nightmare[5]". (Pet. App. B, p. 11a). Petitioner Momah's work environment was made hostile by his work and movement being severely scrutinized, his leave requests to visit his daughter and niece were repeatedly questioned, credit for work he performed were given to another AJ, his supervisor raised her voice on the Petitioner on several occasions, his belongings were boxed and placed in the storage room without his knowledge, placed on AWOL without notice even though he had leave to cover his absence, among other events.

Between May 25, 2000 and March 2001, Petitioner Momah requested hardship transfers to Cleveland, Dallas, Detroit, Memphis, any where, but Indianapolis. His requests were all rejected allegedly for lack of positions, budget, or low inventory. (Pet. App. B, p.12a). Petitioner Momah requested to amend his complaint. Mr. Miller stated that the denial would be treated as a continuing violation. However, he accepted the hostile work environment claims, but did not investigate it.[6] (Pet. App. B, p. 11a).

Eventually the intense and persisting hostile work environment took a toll on Petitioner Momah's health. As a result, in September 2000, the Petitioner's

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[5]After Chief Judge Audrey Scott found out Petitioner Momah's predicament and the hostility that he was being subjected to in Indianapolis, she requested that Petitioner Momah be returned to Memphis. Mr. Grabon rejected it. (Pet. App. B, p. 12).

[6]Mr. Miller advised Petitioner Momah that he spoke to Attorney Johnson, and Attorney Johnson informed him of Ms. Young and Mr. Neely's track record of retaliation.

doctor placed him on medical leave. Also, Ms Young requested permission from Ms. Barbara Lawrence, the Personnel Official, to terminate Petitioner Momah's job. As soon as, Attorney Johnson discovered Ms. Young's plan, he stepped in and foiled it.

Upon return from medical leave on April 8, 2001, Petitioner Momah was placed in an office facing the office's busiest copy machine. The Petitioner filed an EEO complaint. This complaint was not investigated. In June 2001, Ms. Young and Judge Whitaker were removed from Petitioner Momah's chain of command. The hostile work environment ceased instantly. Shortly after the above removal, Judge Scott retired.

II. SELECTION OF MS. ZIA SCHOSTAL

Shortly after filing the EEO complaint in late April 2001, Petitioner Momah applied for a position in the Memphis District Office. He was neither interviewed nor selected for the position, even though his performance in Memphis was excellent and had significantly contributed to Memphis District meeting its fiscal year goal[7]. On or about May 2001, Mr. Grabon and Ms. Doris Wood selected Ms. Zia Schostal. Ms. Schostal had resigned from the Respondent's office fifteen years prior to her selection. (Pet. App. J, p.87a). Judge Audrey Scott testified that she was surprised that the Petitioner's name had been removed from

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[7]In her one of her evaluations, Judge Scott stated that Petitioner Momah continued to demonstrate excellence as an administrative judge while working in Memphis. Judge Scott further noted that "Davidson's work ethics, his innate sense of justice, and his willingness to put forth the extra effort to get the job done, significantly contributed to the Hearings Unit's performance this fiscal year." (Pet. App. J, p. 83a).

consideration, even though he handled the majority of the cases in Memphis. (Pet. App J, p. 87a-89a). After Petitioner Momah was denied selection in Memphis, Respondent directed him to assist Memphis with its huge inventory requiring traveling between Indianapolis and Memphis. Petitioner Momah's performance of the above task was outstanding.

III. SELECTION OF MS. BARNO

In or about April 2001, a vacant AJ position was announced in Detroit. The Petitioner applied like other external candidates. In spite of Petitioner Momah's experience and accomplishments as a judge, Mr. Neely neither interviewed nor selected Petitioner Momah. In or about May 2001, Mr. Neely selected Ms. Barno, who had no prior EEO experience, in spite of her performance problems. (Pet. App. B. p. 12a).

When questioned about his harsh treatment of Petitioner Momah, Mr. Neely testified that he and **Mr. Grabon shared a common story about Petitioner Momah.** (Pet. App. K, p. 90a). As a result of the Respondent's actions, Petitioner Momah withdrew his request for hardship transfer and application for subsequent positions, lost seven months of pay, lost tangible and intangible benefits associated with geographical location, lost with-in-grade increases, lost locality pay, loss of leave, had a diminished worth of salary because he used leave without pay to travel to Detroit, Chicago, and Cleveland in order to attend his family's needs. In addition to the above, Petitioner Momah suffered physical and emotional injury.

On June 4, 2002, Respondent issued a Final Agency Action (FAA) dismissing Petitioner Momah's claims by addressing only those issues raised in 1998

and 1999, but did not address Petitioner Momah's subsequent claims. Judge Kelly Godde who was detailed to the EEO office, advised Petitioner Momah that the FAA he received was not the FAA she and Ms. Veronica Venture had drafted. Shortly after the FAA was issued, Ms. Venture resigned and left the agency. (Pet. App. B, p.13a). On August 30, 2002, Petitioner Momah filed a complaint in the federal court.

B. DECISIONS BELOW

On October 20, 2003, the district court granted summary judgment to Respondent. (Pet. App. B, p. 14a & F, p. 54a-55a). On March 15, 2006, the panel issued a decision affirming the district court. (Pet. App. H, p. 30a-53a). On January 8, 2007, the United States Supreme Court vacated the decision. In vacating the decision, the United States Supreme Court directed the Sixth Circuit to evaluate the Petitioner's complaint in light of its decision in *Burlington Northern* case. (Pet. App. C, p. 28a). On June 21, 2007, the panel issued another decision reaffirming the district court's decision. On September 27, 2007, the panel denied the request for an en banc hearing. (Pet. App. A, p. 1-2a).

REASONS FOR GRANTING THE PETITION

REVIEW IS WARRANTED TO RESOLVE THE CONFLICT IN THE CIRCUIT COURTS REGARDING WHETHER A DENIAL OF A HARDSHIP TRANSFER CONSTITUTES AN ADVERSE EMPLOYMENT ACTION.

A. Certiorari Is Needed To Resolve the Recurring Entrenched Conflict of Authority involving adverse employment action

This case presents an important issue of law involving adverse employment action in discrimination cases and the divergence of opinions among the federal courts.

On March 15, 2006, and June 21, 2007, the Sixth Circuit issued an order affirming the decision of the district court's grant of summary judgment in favor of the Respondent on Petitioner Momah's claims of discrimination and retaliation. The Sixth Court ruled that although Petitioner Momah had established three elements of a prima facie case for discrimination, he did not prove that he suffered an 'adverse employment action' when he was denied hardship transfers to a lateral position. The Sixth Court defined adverse employment action as:

> A"materially adverse" change in the terms or conditions of employment is typically characterized "by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Hollins*, at 662.

> Under this definition, it would appear that a purely lateral transfer or denial of the same, which by definition results in no decrease in title, pay or benefits, is not an adverse employment action for discriminatory purposes.

See Kocsis, 97 F.3 d at 886. (Pet. App. B, p. 20a).[8]

This decision is in conflict with the authoritative decisions of some of the United States Courts of Appeals that have addressed this issue, as well as the spirit and intent of Title VII.

Petitioner Momah contends that in affirming the district court's decision, the Sixth Circuit erred by narrowly interpreting its definition of "adverse employment action" by excluding the result or harm, as well as the effect of the denial on the terms, conditions, and privileges of his employment.

In so narrowly defining adverse employment actions, the Sixth Court of Appeals failed to adequately distinguish the ways a hardship transfer request is made versus a unilateral decision by an employer to transfer an employee. Hardship transfer requests are usually personal in nature and unique to individual circumstances. The request for transfer is generally granted by the Respondent as a benefit and privilege of employment. Importantly, the Sixth Circuit did not take into consideration the tangible effects or harm that

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[8]A panel of the Sixth Circuit, in an opinion not selected for publication in the Federal Reporter, implicitly recognized that a refusal to grant a transfer request can be an adverse employment action if "the employee has a right to the requested change by law or through the terms and conditions of his employment." *Barrett v. Lucent Technologies, Inc.* 36 Fed. Appx. 835, 842, 2002 WL 1272116 (6th June 6, 2002) (emphasis added) (Not selected for publication in the Federal Reporter, No. 00-4458).

the denial of a hardship transfer had on terms and privileges of employment.

While a number of circuit courts had addressed transfer in the context of adverse employment action, those circuit courts that had addressed a denial of a hardship transfer to a lateral position under substantive provision, as well as under the anti-retaliation provision of Title VII had a "divergence of opinions" regarding what constitutes an adverse employment action. *Schultz v Alticor/Amway Corp.*, 177 F. Supp 2d 674, 681 (W.D. Mich 2001), *aff'd*, 43 Fed. Appx. 797, 2002 WL 1787981 (6th Cir. Aug. 1, 2002)(NO. 01-2709), *Randlett v Shalala*, 118 F.3d 857, 862 (1st Cir. 1997). Specifically, courts are divided about whether, in order to qualify as an adverse employment action, "the action must be an ultimate employment action such as hiring, firing, or promoting or whether an alteration of the terms or conditions of employment will suffice." *Id.* Only the Fifth and Eighth Circuits adhere to the "ultimate employment decision" doctrine. *Ledergerger v Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)

A number of federal courts have held that the denial of a geographical transfer can constitute an adverse employment decision. Thus, in *Bouman v Block*, 904 F.2d 1211 (9th Cir.), *cert. denied*, 502 U.S. 1005 (1991), the evidence showed that the plaintiff, a deputy sheriff was denied transfer to a different law enforcement station (the Norwalk station) in retaliation for filing a complaint with the EEOC. The defendant contended that the plaintiff showed no adverse employment action from the denial of her transfer request. Disagreeing, the Ninth Circuit stated as follows:

> *Bouman* must show that the County took

> some action in response to her exercise of Title VII rights. In *Ruggles v. California Polytechnic State University*, 797 F.2d 782, 786 (9th Cir. 1986), we held that "the closing of a job to plaintiff and the loss of opportunity **to even compete for the position" established an adverse employment decision resulting from retaliation**. *Bouman* need not show that she was fired, demoted or suffered some financial loss as a result. The fact that the position was not made available to her because of her involvement in protected activities is sufficient. 940 F.2d at 1229. (Emphasis added).

In *Randlett v Shalala*, 118 F.3d 857 (1st Cir. 1997), the Plaintiff who had filed a complaint against the Department of Health and Human Services (HHS), was denied a hardship transfer from Denver to the Boston office of the HHS, in order to be close to his ailing mother. *Randlett* alleged that the refusal to grant him hardship transfer was in retaliation to his previous Title VII employment discrimination complaint against HHS, stating that hardship transfers were routinely granted to individuals with hardship requests similar to or less serious than Randlett's. Randlett submitted affidavits from HHS employees attesting that HHS did approve hardship transfers with some regularity. The district court accepted HHS' argument that the refusal of a lateral transfer to another office of the agency does not give rise to an adverse employment action under Title VII, even if done for an improper motive.

On appeal, the First Circuit disagreed with the district court. The court pointed out that Title VII states that an employer may not "discriminate" against

an employee or applicant "because [the employee or applicant] has made a charge... or participated in any manner" in a Title VII investigation or proceeding. 42 U.S.C. section 2000c-3(a). The court further pointed out that "elsewhere, the statute lists actions that can constitute discrimination, specifying a refusal to hire, a discharge, or any discriminatory treatment with respect to "compensation, terms, conditions, or privileges of employment." *Randlett*, 118 F.3d at 862, citing 42 U.S.C. section 2000c-2(a). The court stated that these "two sections should be read together." *Id.*

The First Circuit further observed that "terms, conditions, or privileges " is an open ended language" which "obviously includes opportunities that are not strictly entitlements." *Id.* The appeals court reasoned that "*Randlett*'s affidavit make clear that at HHS a permanent **transfer for hardship reasons is a common enough practice and so arguably a 'privilege of employment."** The court then concluded as follows:

> For Randlett, the transfer here was doubtless as important as a promotion. Assuming an improper motive, it is hard to see why denial of a hardship transfer in this case could not be discrimination under Title VII. *See Bouman v Block*, 940 F.2d 1211, 1229 (9th Cir.), *cert. denied*, 502 U.S. 1005... (1991).

Id. In other words, "given the impact of *Randlett* and her affidavits about customary practice, we cannot accept the HHS view that a refusal to transfer is outside Title VII." *Id. Parker v. State of Del., Dept. Of Public Safety*, 11 F. Supp 2d 467, 478-79 (D.Del. 1998) *Von Gunten v Maryland*, 243 F. 3d 858, 864-65 (4th Cir.

2001) explicitly rejects *Mattern*, requiring only that there be "evidence that alleged discriminatory acts or harassment adversely affected, 'terms, conditions, or benefits' of the plaintiff's employment."

In *Boykin v. City of Mobile*, 1998 WL 34169127 [9](C. A. 11), a non-geographical lateral transfer without loss of salary, fringe benefits, opportunity for advancement or prestige, the trial court denied the defendant's motion for summary judgment there by suggesting that purely lateral transfer could constitute an adverse employment action.

However, the Seventh Circuit in *Williams v. Bristol-Myers Squibb Co.*, 85 F. 3d 270, 274 (7th Cir. 1996) disagreed with the Third Circuit, and held that "a purely lateral transfer, cannot rise to the level of a material adverse employment action" even if it results to the kind of harm suffered in this matter. *Cited in Fallon v. Meissner* et al, 2002 WL 32828515 (C.A.3).

B. The Issue Is Important And Keeps Recurring

The opinions of the circuits on adverse employment action is so divergent that a review by this court is needed. To boot, this issue keeps recurring on different facets of Title VII issues. The number of charges filed before the Equal Employment Opportunity Commission (EEOC) from 2000 to present bears testimony to this. See www.eeoc.gov/stats/charges.html.

A writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit in order to set a uniform application of the Court's decision and

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[9]180 F. 3d 271 (11th Cir. 1998 Unpublished Opinion)

the intent of the Congress. If certiorari is not granted, there is risk of perpetuating the uncertainty and lack of uniformity that has become tantamount in this issue. It is of critical importance that the court not to send a signal that some families deserve better than others.

THE COURT SHOULD VACATE THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS BECAUSE A THREE JUDGE PANEL OF THE SIXTH CIRCUIT DECLINED TO FOLLOW THE STANDARD SET FORTH BY THIS COURT.

A. The Court, in *Burlington Northern*, did not require an ultimate employment action in a discriminatory retaliation claim.

In its decision, the Sixth Circuit stated that " with regard to his third and fourth claims, even "assuming arguendo" that those actions constitute adverse employment actions under White, Petitioner Momah is still unable to establish a prima facie case of retaliation." (Pet. App. B, p. 24a-25a). Phrased that way, "assuming arguendo," it shows that the Sixth Circuit did not believe that the Petitioner suffered an adverse employment action. The Sixth Circuit's decision reflects that for the Petitioner to suffer an adverse employment action in this retaliation claim, he must sustain an ultimate employment action or a demotion to a less tangible position which is the core emphasis of the substantive provision of section 703 of Title VII of the Civil Rights Act. (Pet. App. B. p.20a-22a). This undermines the reasoning in *Burlington Northern*. (Pet. App. B, 23a).

In *Burlington Northern*, the Court noted unambiguously that the Sixth Circuit imposed a

substantive limitation that does not exist in the anti-retaliation provision. In making its distinction, the Court noted that, "the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace" *Wachovia Bank, N.A v. Schmidt*, 546 U.S. ___(2006)cited in *Burlington Northern, at* 2413. Furthermore, the court noted that "an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." *Burlington Northern*, at 2412. *Burlington Northern* decision acknowledges that to adopt a limitation in the anti-retaliation provision would result in Title VII failing to achieve the "anti-retaliation provision's "primary purpose," namely,"maintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) cited in *Burlington Northern*, at 2412. *Burlington Northern* decision requires a court to look at the full context of an employer's actions and its **real impact** on the employee, not just the effect on his or her pay. *Id.* at 2412-13.

Significantly, in rejecting Petitioner Momah's claims, the Sixth Circuit ignored the harm suffered by the Petitioner and the impact of the harm/injury sustained, as well as the subsequent claims which were not related to the original claims. If the Sixth Circuit had considered the surrounding circumstances and the real impact on Petitioner Momah, certainly it would have held that no reasonable employee would engage in an EEO activity, if he or she know that the afore cited actions would befall him, as evidenced by the Petitioner's withdrawal of his hardship request and employment applications. *Burlington Northern*, at 2415-17.

B. The Sixth Circuit decision undermines *Burlington Northern, Clark County School District, Mt. Health City School District Board of Education and Wilkie, et al.*, which require the evaluation of the adverse employment actions-surrounding circumstances, sequence of events (proximity); and the motivating factors in order to determine if retaliation had occurred.

This Court should grant the petition on this important civil right question. On March 15, 2006, the Sixth Circuit upheld the district court's grant of summary judgment. In upholding the district court's decision, the Sixth Circuit noted that the retaliation claims failed for lack of adverse employment action, but not the fourth element, causal connection. (Pet. App. E, p. 50a-51a). On January 8, 2007, this Court vacated and remanded the Sixth Circuit decision for consideration in light of *Burlington Northern*. On June 21, 2007, the Sixth Circuit, **for the first time, and surprisingly without notice** held that the retaliation claims lacks causal connection. Specifically, the Sixth Circuit Stated that "Momah cannot establish the fourth element of the burden-shifting approach; there is no evidence of a causal connection between the protected activity and the adverse employment action." (Pet. App. B, p. 25a).

In rejecting the Petitioner's evidence of causation, the Sixth Circuit relied on its decision in *Walborn v. Erie County Care Facility*, 150 F. 3d 584, 589 (6th Cir. 1998) which held that:

> A plaintiff who complained of numerous alleged adverse actions that occurred both before and after her protected activity could not

> establish the causal connection element because she had not alleged that her employer treated her differently since she asserted her rights and that the fact that some of the allegedly retaliatory actions took place after she filed an EEOC charge is insufficient to establish the requisite causal connection. See *Cooper v. City of North Olmsted* 796 F. 2d 1265, 1272 (6th Cir. 1986) requiring direct evidence linking the employer's issuance of citation to the protected activity. (Pet. App. B, p. 25a) & *Walborn*, at 589.

The Sixth Circuit's blanket application of its *Walborn decision* is inappropriate in this matter, in light of the fact that the factual circumstances and sequences of events between *Walborn* and Petitioner Momah are different.

Although *Burlington Northern's* central concern was a determination of what constitutes an adverse employment action, a determination of causation could not be made without touching on the *Burlington* analysis which requires evaluation of the surrounding circumstance (adverse employment actions). In other words, under *Burlington Northern standard*, "the significance of any given act of retaliation will often depend upon the particular circumstances." *Burlington Northern*, 126 S.Ct. at 2415.

Certainly, the principle articulated in *Walborn* by the Sixth Circuit may be applicable to *Walborn's* factual circumstances, but not in this instance case because of different factual circumstances and the proximity of events. Therefore, it is erroneous for the Sixth Circuit to strictly impose the *Walborn* principle rather than applying the principles articulated in *Burlington Northern, Clark County School District,*

and Wilkie which were decided after Walborn in determining causation.

In narrowing its application of the anti-retaliation provision, the Sixth Circuit stated that Petitioner Momah's request was first denied on February 3, 1998 and then August 1998, he "did not engage in protected activity until October 13, 1999", and that his request for a hardship transfer continued to be denied after his EEO activity. (Pet. App. B, p. 25a). The Sixth Circuit further noted that Petitioner Momah had not shown that the action of the Respondent was different after his EEO complaint. (Pet. App. B, p. 25a).

However, the Sixth Circuit overlooked all the informal EEO contacts in August 1998, September 1998, and October 1998 that did not result in a formal complaint. Significantly, the Sixth Circuit failed to recognize an EEO complaint filed for the denial/delaying Petitioner Momah's promotion in 1998 which the Respondent had referred to its mediation unit. The Sixth Circuit's reference to only October 13, 1999, EEO contact that resulted in a formal complaint creates a presumption that, in order to show retaliation, one has to file a formal/official EEO complaint. Title VII did not envision the above position.

In *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 286 (1977), the Court set forth a test for causation. The test for causation is whether the retaliation was a substantial or motivating factor for Respondent's subsequent actions? See also *Wilkie v. Robbins*, 127 S.Ct 2588, 2615-6 (2007) (citing *Mt. Healthy City School Dist. Board of Education*, 429 U.S. 274 (1977). The answer to this test is found in *Burlington Northern* which requires the evaluation of the circumstances surrounding Respondent's actions.

If the Sixth Circuit had followed the test for causation, it would notice that Petitioner Momah was not initially told that he would not be transferred to Detroit. Rather, he was advised that as soon as the situation improved in Memphis, his request would be revisited. In addition, during that period, Petitioner Momah and Mr. Neely had a good working relationship. In fact, it was this relationship that prompted Mr. Neely to state to the Petitioner, "I would like to bring you back". Mr. Neely then advised the Petitioner of the process, which was, to send a letter to Washington. The relationship between Petitioner Momah and Mr. Neely began to sour after the Petitioner's EEO complaint against Mr. Grabon, Mr. Soto, and Ms. Thornton. The relationship worsened after Petitioner Momah's EEO complaint against Mr. Neely in October and November 1999.

While Petitioner Momah may not recover for any untimely filed formal retaliatory acts, the untimely retaliatory acts are admissible as background evidence to show Respondent's pattern of retaliation. *National Railroad v Morgan*, 122 S. Ct. 2061, 2072 (2002).

Had the Sixth Circuit evaluated the Petitioner's retaliation claims in line with *Burlington Northern, Clark County School District, Mt. Healthy City School Dist. Board of Education*, and Wilkie, it would have discovered that retaliation motivated the following harsh treatment and sequences of events that occurred each time Petitioner Momah filed an EEO complaint:

(1) Petitioner Momah's first request for a hardship transfer was in January 1998. On February 3, 1998, Petitioner Momah received a letter from Mr. Soto stating that because of work load and the staffing need in Memphis his request would not be granted for now. (Pet. App. B, p.6a). The letter further stated, "**we will be happy to reconsider your request if there is a**

change in the MDO'S workload and staffing." (Pet. App. B, p.6a).

(2) After the staffing needs and workload improved and Petitioner's daughter's medical condition worsened, in August 1998, Petitioner Momah's requested another transfer from Mr. Grabon. Mr. Grabon directed Petitioner Momah to talk to Mr. Soto. The Petitioner traveled to the headquarters in Washington, DC and spoke with Mr Soto. Mr. Soto advised Petitioner Momah that he would not be transferred to Detroit because of a low inventory in Detroit, but that his transfer would be considered at a later time. Petitioner Momah lodged an EEO complaint with Ms. Thornton, Mr. James Miller, Mr. Paul Miller, and Mr. Igasike. Both the Millers and Mr. Igasike questioned Mr. Soto and Ms. Thornton in August1998. Shortly after this incidence, on September 8, 1998, Petitioner Momah's request was formally denied. At this time, the staffing needs and workload had improved in Memphis. The letter of denial was signed by Mr. Neely, who was not directly involved in these events and had earlier advised Petitioner Momah that he had no authority to approve or deny his request. In any event, Mr. Neely advised Petitioner Momah that he was not the official who made the decision to deny his request.(Pet. App. B, p. 5a). Petitioner believes that Mr Neely signing the letter was a bid to conceal Mr. Grabon, Mr. Soto, and Ms. Thornton's role in that official denial.

(3) Consequently, the Petitioner met with Mr. Grabon and blamed him for the Petitioner's predicament. The Petitioner advised Mr. Grabon that he had contacted the EEO office. Mr. Grabon told Petitioner Momah that "filing an EEO complaint is like falling of the wagon." Bot Mr. Soto and Mr. Mr.

Grabon were very upset with Petitioner Momah. Mr. Soto's anger was evident to the Petitioner when he angrily stated to the Petitioner, "Mr. Momah, you are not going to Detroit." (Pet. App. B, p. 9a). The petitioner believes that as a result of these complaints, the door to Detroit transfer was shut.

(4) Following these events, Mr. Grabon denied Petitioner Momah's promotion but promoted Judge Kimmelman who had a poor performance as Judge Scott testified. Judge Kimmelman was not due for promotion at the that time. Petitioner Momah filed an EEO complaint which was referred to Ms. Johnson, a Mediator. Formal complaint was not filed until November 1999 because of the mediation.

The Petitioner believes that the filing of a formal complaint, made his chances of being transferred to Detroit become next to nonexistent (worsened) as shown below.

(1) Shortly after the EEO complaint, Petitioner Momah was openly accused of performance problems in Detroit by Mr. Soto, Mr. Neely, and Mr. Grabon.

(2) **Ms. Barno requested a hardship detail/transfer to the very 'unfunded' vacant position sought by Petitioner Momah. Her request was approved along with other Caucasian judges to their intended destinations except the Petitioner.** (Pet. App. B, p. 12a).

(3) During that period, the Petitioner Momah's November 1999 promotion was denied. Upon learning of the denial, Petitioner Momah amended his EEO complaints. The Sixth Circuit noted that the Petitioner's promotion was denied because he had to wait for one year from his last promotion. However Judge Scott and Ms. Ross Wheeler, Personnel Technician, testified that in the Petitioner's promotion

category, the Petitioner was not required to wait for one year. (Pet. App. J, p. 85a-86a). Besides, Judge Kimmelman who was in the same promotion category as the Petitioner was promoted in less than one year. (Pet. App. J, p. 83a).

(4) In February 2000 Petitioner Momah was **lured** into going to Indianapolis to remove him from Judge Scott's protection in Memphis.

(5) In Indianapolis, Ms. Young told Petitioner that Mr. Grabon, Mr. Neely and Mr. Soto advised her of the Petitioner's EEO complaints. There was no apparent reason for Mr. Grabon, Mr. Neely and Mr. Soto to discuss the Petitioner with Ms. Young other than for retaliation.

(6) Shortly after the above contact, Petitioner Momah was subjected to severe hostile work environment in Indianapolis. While Petitioner was on an approved medical leave, Ms. Young placed the Petitioner on AWOL without notice and asked Ms. Barbara Lawrence, the Personnel Official, for permission to terminate Petitioner.

(7). In April 2001, the Respondent announced vacant AJ positions in Detroit, Memphis, and Dallas. The Petitioner applied but was neither granted an interview nor selected in spite of his excellent work record.

Therefore, the Sixth Circuit's skipping of critical evidence (such as the Respondent's constantly changing reasons for denial of the hardship transfer, Mr. Grabon's and Mr. Soto's anger, and Mr. Grabon's comment about 'falling off the wagon', and failing to acknowledge the temporal proximity of events and the motivating factor) and requiring *direct evidence* of a causal link between protected activity and employer's subsequent actions instead of a circumstantial link

undermines this Court's standard of evaluating causation.

Finally, Petitioner Momah maintains that had he not made EEO complaints in August 1998, September 1998, October 1998, February 1999, October 1999, a formal complaint in November 1999, and subsequent EEO complaints, he would not have suffered as alleged. Therefore, the district court dismissal under Rule 56 of the Federal Rules of Civil Procedure is inappropriate. A review and reversal of the Sixth Circuit's approach under Title VII will advance the legislative purpose of Title VII of the Civil Rights Act of 1964, as amended. To allow this decision to stand in the face of clear discrimination and retaliation would effectively eviscerate the Civil Rights laws – a result not wanted by the judicial system.

CONCLUSION

Therefore, based on the above reasons, Petitioner Momah prays this honorable court to grant his Petition for a Writ of Certiorari and remand this matter to the district court for trial or back to the Respondent to investigate the timely filed subsequent complaints that the Sixth Circuit would not address in order to prevent proper discrimination cases from being disposed of on summary judgement.

Respectfully submitted,

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Appendix A

Filed: 9/27/07
No. 03-2561
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Davidson Momah,
Plaintiff - Appellant,

v.

Cari M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants - Appellees.

BEFORE GUY, BATCHELDER, and, GIBSON, Circuit Judges.

The COURT having received a petition for rehearing en banc and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Footnote

1The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

Appendix B

(any footnotes trail end of each document)

No. 03-2561
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Davidson Momah,
Plaintiff - Appellant,

v.

Cari M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants - Appellees.

April 26, 2005, Submitted
June 21, 2007, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

COUNSEL: For DAVIDSON MOMAH, Plaintiff - Appellant: Elaine R. Carlis, Sherbow & Mitchell, Pleasant Ridge, MI.

For CARL M., Chairman, Equal Employment Opportunity Commission, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendants –

Appellees: Peter A. Caplan, Asst. U.S. Attorney, U.S. Attorney's Office, Detroit, MI.

JUDGES: Before GUY, BATCHELDER, and JOHN R. GIBSON,[1] Circuit Judges.

OPINION

JOHN R. GIBSON, Circuit Judge.

Davidson Momah filed a complaint against the EEOC in federal court alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. The district court granted summary judgment for the EEOC, which this court affirmed in 2006. *Momah v. Dominguez*, 175 Fed. Appx. 11 (6th Cir. 2006). Following a petition for certiorari filed by Momah, the United States Supreme Court vacated our decision in light of *Burlington Northern & Santa Fe Railway Co. v. White*, U.S. , 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), and remanded to this court. *Momah v. Dominguez*, U.S. , 127 S. Ct. 933, 166 L. Ed. 2d 697 (2007). While *White* changes our analysis regarding Momah's retaliation claim, it does not change our conclusion that the district court's grant of summary judgment was proper. We again AFFIRM the district court.

Davidson Momah, who is black, was born and raised in Nigeria. He came to the United States in 1980 to attend college and later obtained his law degree. In April 1994,

he began working as an investigator in the Detroit, Michigan office of the EEOC. During his three years as an investigator in Detroit, Momah received periodic promotions and favorable evaluations from his supervisors. In early 1997, Momah applied for and was selected to fill a vacant Administrative Judge position in the EEOC's Memphis, Tennessee office.[2] When Momah moved to Memphis his wife and daughter remained in Detroit, but it was his intention that they would join him in Memphis once he found a house for the family. However, in June 1997, Momah was hospitalized after being physically assaulted by a white supremacist at a gas station. Traumatized by the attack on her husband and fearful of further attacks, Momah's wife became unwilling to relocate to the South, and she demanded that he request to be transferred back to Detroit. Although Momah initially refused, he eventually relented when his daughter began to experience health problems.

While visiting his family over the 1997 Christmas season, Momah met with officials at the Detroit office to discuss the possibility of a hardship transfer to a vacant Administrative Judge position in Detroit. The director of the Detroit office, James Neely, told Momah that although he would like to bring him back, he did not have the authority to do so. However, Neely did explain the process by which Momah could request a transfer through EEOC headquarters in Washington, D.C. On Neely's advice, Momah sent a letter to headquarters requesting a hardship transfer to Detroit. When Ralph Soto at EEOC headquarters received the request, he contacted Walter Grabon, the director of the Memphis office where Momah was then working as an Administrative Judge. Grabon opined to Soto that

Momah's request should be denied. By letter dated February 3, 1998, EEOC headquarters notified Momah that it "was unable to grant [the] request for reassignment to the Detroit District Office at this time." The letter, signed by Soto, stated that the denial was "due to the current workload and staffing levels in the Memphis District Office" and that the requested reassignment "would not serve our current operational needs," although it did inform Momah that headquarters would "be happy to reconsider your transfer request if there is a change in the [Memphis office's] workload and staffing situation."

Around the time of the denial, Momah met with Grabon, who told Momah that he would need him around for at least six months to help reduce the backlog at the Memphis office before Grabon would support any reassignment request. Momah reluctantly agreed to this arrangement. Approximately six months later, Momah again met with Grabon to discuss the possibility of a hardship transfer. By this time, Momah's daughter had been diagnosed with scoliosis, a condition requiring treatment by specialists in Detroit and Chicago. Momah showed Grabon a letter that he later sent to EEOC headquarters recounting his daughter's medical problems and pleading for urgent action on his transfer request. In the letter Momah stated his willingness to transfer to any position in Detroit, including a temporary assignment as an Administrative Judge or even into his former position as an investigator. Momah also promised to pay his relocation expenses and offered to take the cases assigned to him for processing in Memphis with him to Detroit if he were permitted to go. Grabon told Momah not to bother making the request because it would not be approved,

but that he should contact headquarters directly about the matter. During the conversation Momah informed Grabon that he was aware that a white male Administrative Judge had been granted a hardship transfer from EEOC headquarters to the Little Rock office of the EEOC in order for him to be closer to his adopted son. Grabon told Momah not to believe rumors about transfers of other EEOC employees.

Sometime after Momah submitted the transfer request to headquarters, Neely convened a meeting at the Detroit office to discuss Momah's request. In attendance were Andrew Sheppard, deputy director of the Detroit office, and Gail Cober, enforcement manager in Detroit. Sheppard, a black male, told Neely that he had no problem with Momah's returning to Detroit, but Cober, a white female, objected. Momah claims that following this meeting, Cober and Administrative Judge Mimi Gendreau, another white female in the Detroit office, began mounting pressure on Neely to convince headquarters to deny Momah's transfer request. Like Cober, Gendreau objected to Momah's return and voiced her objections to Sheppard and Neely, even going so far as to tell Sheppard that she would rather resign than ever work with Momah again.

While his request was pending in August 1998, Momah flew to EEOC headquarters to meet with Soto in person to discuss the possibility of a transfer. Momah relayed his daughter's health condition, his willingness to accept any assignment in the Detroit office including a temporary detail or an investigator position, and his willingness to bear his own relocation expenses. However, Soto told Momah that Detroit did not need

any additional staff due to low inventory. Following the meeting with Soto, Momah went to the office of Elizabeth Thornton, one of Soto's superiors, to discuss his situation. After listening to his concerns, Thornton told Momah that the low inventory in Detroit made a transfer there impossible. She suggested that Momah consider a transfer to the Indianapolis office, since it was closer to Detroit than Memphis, just to keep his options open.

In a letter dated September 8, 1998, Momah's second request for a hardship transfer was formally denied. The letter, signed by Soto, stated that a transfer as either an Administrative Judge or as an investigator in the Detroit office would "not be possible ... at this time." It indicated that Momah's request had been discussed with Neely, who had determined that "a reassignment [to the Detroit office] is not commensurate with the district's needs." According to Soto, he had asked one of his subordinates, Marilyn Hayes, to contact Neely regarding Momah's request. According to Hayes, Neely told her that "the Detroit office did not want [Momah] back" and "he was not welcome back" because "they had had problems with him when he had been there." After learning that his request had been denied, Momah contacted Neely directly. Neely admitted to Momah that headquarters had contacted him about Detroit's inventory, but that the ultimate decision of whether to grant or deny his transfer request was made out of headquarters. In October, Momah met with Neely personally at the Detroit office, and Neely again told Momah that he was not responsible for the denial and that all he did was inform headquarters about inventory levels at the Detroit office. Later in October, Momah contacted Soto

and asked if he would reconsider the denial. Soto told him, "Mr. Momah, you are not going to Detroit." In November, Momah met with Grabon, who denied any role in the denial and told Momah to take up the issue with Neely and headquarters. In the ensuing months Momah had a number of conversations with Grabon about his desire to transfer to Detroit during which he informed Grabon that he believed "what they were doing to [him] was discriminatory."

In September 1999, approximately one year after Momah's second request for a hardship transfer had been denied, Momah learned that a white investigator, Daniel Dushman, had been granted a hardship transfer to the Detroit office. Dushman was an investigator in the Detroit office during the time Momah had worked there. In early 1999, Dushman had requested and was granted a hardship transfer from Detroit to the EEOC office in Alberquerque, New Mexico. Less than seven months later, Dushman wrote to Thornton at EEOC headquarters requesting a hardship transfer back to Detroit on account of family problems. Despite his being demoted while working as an investigator in Detroit and his acknowledged performance problems at the Alberquerque office, Dushman's transfer request was approved. After learning of Dushman's transfer, Momah contacted numerous EEOC officials in late September and early October 1999 to renew his request for a transfer. He contacted Jacqueline Bradley, the director of field management programs, and Marilyn Hayes, both at EEOC headquarters, to determine the status of any vacancies in the Detroit office, as well as the current inventory levels there. He made similar inquiries of Neely in the Detroit office. According to Momah, the officials informed him that the situation

had not changed since his initial request and that his request continued to be denied.

On or about October 13, 1999, Momah initiated contact with an EEO counselor, claiming that the denials of his transfer requests were discriminatory. After the informal process failed, Momah filed a formal complaint with the EEO on November 24, 1999, claiming that his repeated requests for a transfer had been denied on account of his race, color, national origin, gender, and disability, and in retaliation for his exercise of rights protected under Title VII. Momah's complaint also alleged that the EEOC, for discriminatory and/or retaliatory reasons: (1) revoked, in September 1998, an offer to transfer him to an Administrative Judge position in Indianapolis; (2) in November 1998 rated his performance as "proficient" instead of "outstanding"; (3) delayed his promotion from GS 13 to GS 14 from December 1999 to January 2000; and (4) delayed his promotion from GS 12 to GS 13 from December 1998 to February 1999. The EEO notified Momah by letter dated May 26, 2000, that the agency was not accepting for investigation claims (1), (2), and (4) for failure to initiate contact with an EEO counselor within forty-five days after they occurred. However, the EEO accepted for investigation his claims regarding the denial of his transfer requests and the delay of his most recent promotion and informed him that his denial of transfer claim was being treated as a continuing violation.

During the course of the EEO investigation, Momah learned that the EEOC had granted several requests from white females to transfer while his requests were still pending. Deborah Barno, a trial attorney in the Detroit office, was assigned temporarily to the vacant

Administrative Judge position in Detroit. During the time that Momah's transfer request was pending, Judith Fournalik requested and was granted a hardship transfer from the New York EEOC office to an investigator position in the Detroit office in order for her to be closer to the law school in Ohio she was then attending. In addition, Linda Stankovich was allowed to return to the Detroit office to a different position than the one she had previously held, and Tina Hoffman, who had earlier resigned her position as budget analyst in the Detroit office, was allowed to return on a contract basis.

In April 2000, the EEOC offered Momah a transfer to an Administrative Judge position in the Indianapolis office of the EEOC in order for him to be closer to his family. Momah accepted the transfer and moved to Indianapolis. He claims that he did so based on representations by EEOC officials that the transfer to Indianapolis was temporary and that he would be transferred to Detroit as soon as a position became available there. Momah was unhappy in Indianapolis, describing his experience there as "a nightmare" due to conflicts with his supervisors over his use of personal time to travel to Detroit to see his family. During his time in Indianapolis, Momah periodically renewed his request for a transfer to Detroit. He sent a letter dated May 25, 2000, to Elizabeth Thornton at EEOC headquarters requesting a hardship transfer from Indianapolis to Detroit. On June 9, 2000, Momah, accompanied by his attorney, traveled to EEOC headquarters to discuss his request with Jaqueline Bradley. While acknowledging the difficulty of Momah's personal situation, Bradley told Momah that a transfer to Detroit would not be possible due to budgetary

constraints and the lack of a vacancy in the Detroit office. Momah's attorney inquired as to the likelihood of a transfer to the Cleveland office or back to Memphis, but Bradley rejected both requests: the former on the basis that the Cleveland office was overstaffed, the latter due to budgetary reasons. By letter dated June 27, 2000, Elizabeth Thornton informed Momah that his request for a hardship transfer from Indianapolis to Detroit was denied on the grounds that there were no funded vacancies in the Detroit office. By letter of July 14, 2000, to Thornton, Momah requested that she reconsider the earlier denial, and by letter dated August 20, 2000, he again requested a hardship transfer. Thornton responded by letter dated August 24, 2000, that the situation had not changed and that there continued to be no vacancies in the Detroit office. Momah took a medical leave of absence for depression and work-related stress in approximately September 2000; he returned to work as an Administrative Judge at the Indianapolis office on April 9, 2001. Shortly after his return, the EEOC received funding to permanently fill the Administrative Judge position in Detroit to which Debra Barno had been assigned on a temporary basis. Momah applied for the position and was considered along with the other applicants. However, he was not selected; instead, Neely selected Debra Barno for the Administrative Judge position. In October of 2001, Momah was granted a transfer from the Indianapolis office back to the Memphis office as an Administrative Judge. However, after accepting the transfer, a disagreement erupted between Momah and EEOC headquarters over who would bear the costs of relocation and when Momah was expected to report for duty. Shortly after this disagreement, Momah notified headquarters that he was rejecting the transfer to

Memphis, stating that "it is in my best interest to remain in the Indianapolis District Office until all the issues raised in my complaints are resolved either by an impartial official within the [EEOC] or before the federal court."

Following the investigation into Momah's complaint, the EEOC issued its Final Action on June 4, 2002. It affirmed the EEO's refusal to investigate Momah's untimely claims, but went on to address the merits of his claims that (1) since January 1998 he has been denied a hardship transfer to Detroit and that (2) his promotion was delayed, all on account of his race, color, national origin, gender, disability, and in retaliation for his engaging in activity protected under Title VII. With respect to his disability discrimination claim, the EEOC concluded that Momah had failed to establish that he was a qualified individual with a disability. With respect to his retaliation claim, the EEOC concluded that he failed to make out a prima facie case because he presented no evidence that those involved with his transfer or promotion were aware that he had engaged in any protected activity. The EEOC concluded that Momah had failed to establish a prima facie case of discrimination on account of race, color, or national origin on his denial of transfer and delay of promotion claims because he failed to present evidence that employees not in a protected class were treated more favorably than he. On his delay of promotion claim, the EEOC concluded that Momah had also failed to make out a prima facie case because he failed to show that he suffered an adverse employment action in that he received his promotion on the first day he was eligible. With respect to his denial of transfer claim, the EEOC concluded that, even if Momah could make out a prima

facie case of discrimination, he failed to present evidence that the agency's reason for denying his transfer--namely that there were no available positions in Detroit--was a pretext for discrimination.

Momah filed the present complaint against the EEOC in federal court on August 30, 2002, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq.; 42 U.S.C. § 1983; the Westfall Act, 28 U.S.C. § 2679(b)(1); the Federal Tort Claims Act, 28 U.S.C. § 2673; unspecified "EEOC Rules and Regulations"; Washington D.C. Civil Rights Law; as well as breach of contract claims under Michigan and Washington D.C. common law. The EEOC filed a motion to dismiss, which the district court denied as to the Title VII and Rehabilitation Act claims, but granted as to the remaining claims. Following discovery, the EEOC moved for summary judgment. The district court issued a bench opinion following a hearing and a written order the following day granting the EEOC's motion for summary judgment in its entirety.

We review the district court's grant of summary judgment de novo. *Johnson v. Kroger Co.*, 319 F.3d 858, 864 (6th Cir. 2003). In reviewing summary judgment, we look at the record in the same fashion as the district court, *Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 403 (6th Cir. 1992), and our review "is limited to the evidence before the district court when it ruled." *Campbell v. Potash Corp. of Sask., Inc.*, 238 F.3d 792, 797 (6th Cir. 2001). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We view all evidence before us in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A genuine issue of fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once the movant has pointed to evidence in the record showing that there are no genuine issues of material fact, the non-moving party must respond setting forth specific facts showing there is a genuine issue for trial. *Guarino*, 980 F.2d at 405 (quoting Rule 56(e)).

The EEOC argues and the district court concluded that Momah's failure to initiate timely contact with an EEO counselor bars his claim that the EEOC discriminated against him by denying his requests for a hardship transfer. A federal employee suing under Title VII must satisfy "rigorous administrative exhaustion requirements and time limitations." *McFarland v. Henderson*, 307 F.3d 402, 406 (6th Cir. 2002) (quoting *Brown v. General Serv. Administration*, 425 U.S. 820, 833, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976)). Relevant here is the requirement that an "aggrieved [federal employee] must initiate contact with a[n] [EEO] Counselor within 45 days of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). Timely contact with an EEO

counselor is an administrative prerequisite to filing an employment discrimination claim in federal court. *Horton v. Potter*, 369 F.3d 906, 910 (6th Cir. 2004); *McFarland*, 307 F.3d at 406.

We conclude that even if Momah failed to initiate timely contact with an EEO counselor, the EEOC waived its untimeliness defense by addressing the merits of his denial of transfer claim at the administrative level without raising a timeliness objection. In a recent Title VII case by a federal employee, we held that "when an agency accepts and investigates a complaint of discrimination ... it does not thereby waive a defense that the complaint was untimely." *Horton*, 369 F.3d at 911 (citing *Belgrave v. Pena*, 254 F.3d 384, 387 (2d Cir. 2001)); *see also Ester v. Principi*, 250 F.3d 1068, 1072 n.1 (7th Cir. 2001); *Bowden v. United States*, 323 U.S. App. D.C. 164, 106 F.3d 433, 438 (D.C. Cir. 1997); *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992); *Boyd v. United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985). However, we recognized that waiver would occur "when the agency decides the complaint on the merits without addressing the untimeliness defense." *Id.* (citing *Ester*, 250 F.3d at 1071-72; *Bowden*, 106 F.3d at 438). Here, although the EEO addressed the untimeliness defense with respect to three of the five claims in Momah's formal complaint, it decided the merits of Momah's denial of transfer claim. Later, in its Final Action, the agency affirmed the untimeliness determinations as to three of the five claims, but again decided Momah's denial of transfer claim on the merits. It was only in support of its motion to dismiss Momah's federal complaint that the EEOC asserted that the denial of transfer claim was untimely. In these circumstances we conclude that the agency waived any

timeliness objection, and therefore Momah's denial of transfer claim is properly before us. *See Horton*, 369 F.3d at 911; *see also Ester*, 250 F.3d at 1071-73 (discussing "strong policy considerations" underlying the rule that agency waives untimeliness defense by failing to address it at administrative level).

Title VII makes it unlawful for an employer "to ... discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). A Title VII plaintiff may establish discrimination either by introducing direct evidence of discrimination or circumstantial evidence supporting an inference of discrimination. *Johnson*, 319 F.3d at 864-65. Momah argues that he has presented direct evidence that his requests for a hardship transfer were denied for discriminatory reasons. "[D]irect evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id.* at 865 (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)). Unlike circumstantial evidence, it "does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Id.* Direct evidence of discrimination "must establish not only that the plaintiffs employer was predisposed to discriminate . . . , but also that the employer acted on that predisposition." *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004) (quotation omitted).

Momah's purported direct evidence of discrimination consists of comments by Gail Cober and Mimi Gendreau regarding his African accent and his poor command of the English language. Viewing the evidence in the light most favorable to Momah, a jury could possibly conclude that Cober and Gendreau's comments were discriminatory. Nonetheless, Momah's contention that these comments constitute direct evidence of discrimination fails because neither Cober nor Gendreau were responsible for the allegedly discriminatory employment action--the denial of his transfer requests. *Carter v. Univ. of Toledo*, 349 F.3d 269, 273 (6th Cir. 2003) ("[C]omments made by individuals who are not involved in the decision-making process regarding the plaintiffs employment do not constitute direct evidence of discrimination."); *Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 433 (6th Cir. 2002) (comments by manager lacking involvement in the decision-making process do not constitute direct evidence); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998)("An isolated discriminatory remark made by one with no managerial authority over the challenged personnel decisions is not considered indicative of age discrimination"). Momah responds that even if Cober and Gendreau did not have ultimate authority over his transfer requests, their vocal opposition to his return to Detroit so influenced Neely as to render them the de facto decisionmakers. However, this contention fails in two respects. First, the undisputed evidence demonstrates that although Neely had significant input into the decisionmaking process, the ultimate decision of whether to grant Momah's request was made out of EEOC headquarters in Washington, D.C. Second, even if we were to assume that Neely's input was outcome-determinative, there is

no evidence that Neely's input was affected by pressure from Cober and Gendreau, instead of simply reflecting his own views about the Detroit office's personnel needs. Because Momah has failed to present evidence that Cober and Gendreau were responsible for headquarters' denial of his transfer requests, their comments, no matter how insensitive, cannot constitute direct evidence that his requests were denied for discriminatory reasons.

Because Momah has failed to present direct evidence of discrimination, he must proceed under the burden-shifting approach first set out in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and later refined by *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). *Johnson*, 319 F.3d at 865. Under this framework, the Title VII plaintiff must carry the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. *DiCarlo*, 358 F.3d at 414. The prima facie case creates a rebuttable presumption of discrimination requiring the defendant to articulate a legitimate, nondiscriminatory reason for the challenged action. *Id.* If the defendant meets this burden, the plaintiff must prove that the proffered reason was a pretext for unlawful discrimination. *Id.*

To establish a prima facie case under Title VII, Momah must demonstrate that (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) he was treated differently than similarly-situated, non-protected employees. *DiCarlo*, 358 F.3d at 415 (6th Cir. 2004) (quotation omitted). Undisputed evidence

demonstrates that Momah is a member of several classes protected by Title VII: he is a black (race) male (gender) from Nigeria (national origin).[3] Likewise, Momah produced evidence that he was qualified for both the Administrative Judge and investigator positions in Detroit to which he repeatedly requested transfer. Moreover, there is evidence from which a jury could conclude that non-protected, but similarly-situated, employees were treated more favorably than Momah.[4]

Although Momah has established three elements of his prima facie case, he has not demonstrated that the denials of his requests for a purely lateral transfer were "adverse employment actions" actionable under Title VII. We have previously held that an "adverse employment action" is one that results in a "materially adverse change in the terms and conditions of [plaintiffs] employment." *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999); *Kocsis*, 97 F.3d at 886. A "materially adverse" change in the terms or conditions of employment is typically characterized "by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Hollins*, 188 F.3d at 662. Under this definition, it would appear that a purely lateral transferor denial of the same, which by definition results in no decrease in title, pay or benefits, is not an adverse employment action for discrimination purposes. *See Kocsis*, 97 F.3d at 886, a conclusion consistent with the authority from our sister circuits. *See, e.g., Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 128 (2d Cir. 2004); *O'Neal v. City of Chicago*, 392 F.3d 909, 913 (7th Cir. 2004); *Amro v. Boeing Co.*, 232 F.3d 790,

797-98 (10th Cir. 2000); *LePique v. Hove*, 217 F.3d 1012, 1014 (8th Cir. 2000); *Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 455-56 (D.C. Cir. 1999); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999); *Burger v. Cent. Apartment Mgmt.*, 168 F.3d 875, 879 (5th Cir. 1999); *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998).[5]

Momah presents no evidence that he suffered a loss of pay, benefits, or title, or any alteration in his job responsibilities as a result of being denied a transfer to Detroit; instead he contends that the denial was adverse because it denied him the opportunity to be closer to his family. His argument raises the issue of whether the adversity of a given employment action should be judged based on an objective or subjective standard. We have previously held that an "employee's subjective impressions as to the desirability of one position over another are not relevant" in determining whether the employee suffered an adverse employment action. *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002); *see also Strouss v. Mich. Dep't of Corr.*, 250 F.3d 336, 343 n.2 (6th Cir.2001) (explaining that "purely personal reasons for turning down a transfer are not sufficient to render a transfer an adverse employment action"); *Reese v. State of Mich. Family Independence Agency*, 31 Fed. Appx. 172, 174 (6th Cir. 2002) (relying on *Strouss* to hold that "purely personal reasons for requesting a transfer are not sufficient to render its denial an adverse employment action"). Instead, we employ an objective test that considers whether the employment action at issue was "objectively intolerable to a reasonable person." *Policastro*, 297 F.3d at 539 (citing *Kocsis*, 97 F.3d at 886); *Strouss*, 250 F.3d at 342; *see also Keeton v. Flying*

J, Inc., 429 F.3d 259, 264-66 (6th Cir. 2005) (applying objective test to determine whether lateral geographic transfer constituted adverse employment action). Our circuit's focus on objective indicia of adversity is consistent with the holdings of our sister circuits that an employee's subjective preference for one position over another is insufficient to render the denial of a purely lateral transfer an adverse employment action under the discrimination provision of Title VII. *See, e.g., O'Neal*, 392 F.3d at 913 (holding that a "purely subjective preference for one position over another" does not "justify trundling out the heavy artillery of federal antidiscrimination law" in a Title VII claim for the denial of a lateral transfer where "the two jobs were equivalent other than in idiosyncratic terms") (quotation and citation ommited); *Williams*, 368 F.3d at 128 (rejecting employee's denial of transfer claim on grounds that employee's desire to return to Las Vegas where she still maintained a home was merely a "subjective, personal disappointment[]" insufficient to "meet the objective indicia of an adverse employment action"); *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532-33 n.6 (10th Cir. 1998)("If a transfer is truly lateral and involves no significant changes in an employee's conditions of employment, the fact that the employee views the transfer either positively or negatively does not of itself render the denial or receipt of the transfer [an] adverse employment action.").

Applying these principles to Momah's claim, we conclude that he has failed to produce evidence from which a jury could conclude that the denial of his request to be transferred to either an investigator or Administrative Judge position in the Detroit office would be adverse to a reasonable person. First, the

record demonstrates that a transfer from Momah's position as an Administrative Judge in Memphis to the investigator position in Detroit would have constituted a demotion within the EEOC, which would lead a reasonable jury to conclude that Momah had suffered an adverse employment action if his request for a demotion had been granted. *See, e.g., Williams*, 368 F.3d at 128 ("Clearly, an employer's denial of a transfer request that would have resulted in a reduction in pay and the employee's demotion within the organization, without more, does not constitute an adverse employment action."). Second, Momah presents no evidence that the Administrative Judge position in Detroit differed in any way, save for proximity to his family, from the identical position he held as an Administrative Judge in Memphis, and thus fails to provide evidence from which a jury could conclude that the Memphis position was objectively worse than the identical position in Detroit. Because Momah has not shown that he suffered an adverse employment action, he fails to establish a prima facie case. [6]

Momah argues that the district court "abused its discretion by completely ignoring all of [his] evidence in support of his retaliation claims." Title VII prohibits retaliation by an employer where an individual has engaged in protected activity. 42 U.S.C. § 2000e-3(a). A plaintiff can establish retaliation under Title VII without direct evidence under the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See, e.g., DiCarlo*, 358 F.3d at 420. Under this standard, Momah must first establish a prima facie case of retaliation by showing that (1) he engaged in an activity protected by Title VII; (2) the defendant knew

of the exercise of his rights; (3) the defendant took an employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. *Id.* If Momah can establish a prima facie case, the burden of coming forward with a legitimate, non-discriminatory reason for the adverse employment action falls upon the EEOC. *Id.* (quotation omitted). However, if the EEOC articulates a non-discriminatory reason, it is then Momah's burden to show that the EEOC's reasons are merely a pretext for retaliation. *Id.*

Momah points to four actions allegedly undertaken by the EEOC to retaliate against him for filing an EEO complaint: (1) delaying one of his promotions; (2) refusing to process his subsequent EEO complaints; (3) negatively rating his performance; and (4) failing to grant his transfer requests. He fails to make out a prima facie case for any of these claims. With respect to the delay of promotion claim, Momah presents no evidence to rebut the EEOC's evidence that he received his promotion on the first day he became eligible, namely the one-year anniversary of his previous promotion. Regarding the EEOC's alleged failure to process his complaint, there is no separate cause of action for his claim, *see, e.g., Jordan v. Summers*, 205 F.3d 337, 342 (7th Cir. 2000) (holding plaintiff's claim that agency "botched the processing of her [EEO] complaint ... does not state a claim upon which relief can be granted"); rather, if Momah was dissatisfied with the agency's handling of a complaint his remedy was to do precisely what he did here: proceed to federal court. *Id.*

With regard to his third and fourth claims, even assuming, *arguendo*, that those actions constituted adverse employment actions under *White*, Momah is still unable to establish a prima facie case of retaliation. Specifically, Momah cannot establish the fourth element of the burden-shifting approach; there is no evidence of a causal connection between the protected activity and the adverse employment action. The EEOC rated Momah's performance as "proficient" as opposed to "outstanding" in November 1998. The EEOC denied Momah's initial request for reassignment as an Admistrative Judge on February 3, 1998. Momah then communicated his willingness to work in Detroit either as an Administrative Judge or as an investigator in August 1998, which was also unsuccessful. Momah, however, did not engage in protected activity until October 13, 1999. Although the performance ratings and the denials of transfer continued to occur after this date, Momah makes no distinction between the conduct of his employer before October 1999 and the allegedly retaliatory conduct. We therefore conclude that no causal nexus exists between the employer conduct and the protected activity, and Momah's final two claims must fail as well. *See Walborn v. Erie County Care Facility*, 150 F.3d 584, 589 (6th Cir. 1998) (holding that a plaintiff who complained of numerous allegedly adverse actions that occurred both before and after her protected activity could not establish the causal connection element because she had not alleged that her employer "treated her differently since she asserted her rights" and that "[t]he fact that some of the allegedly retaliatory actions took place after [she] filed an EEOC charge is insufficient to establish the requisite causal connection").

The judgment of the district court is AFFIRMED.

Footnotes

1The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

2An EEOC Administrative Judge hears and decides, at the administrative level, complaints brought by federal employees alleging unlawful discrimination by their employers.

3Momah argued to the district court that he was discriminated against on account of disability in violation of the Rehabilitation Act. However, he does not raise this issue on appeal, and so has abandoned it. *See Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 881 (6th Cir. 1996).

4The record demonstrates that: (1) Dan Dushman, a white male, was granted a hardship transfer to an investigator position in Detroit; (2) Deborah Barno, a white female, was assigned temporarily to the vacant Administrative Judge position in Detroit; (3) Judith Fournalik, a white female, was granted a hardship transfer to an investigator position in the Detroit office; (4) Linda Stankovich, a white female, was allowed to return to the Detroit office to a different position than the one she had previously held; and (5) Tina Hoffman, a white female, was allowed to return to the Detroit office on a contract basis after earlier having resigned. *See Ercegovich*, 154 F.3d at 352 (holding that comparables need not be identical; rather, they need only be similarly situated "in all of the relevant

aspects").

5Momah urges us to reject this uniform authority based on the First Circuit's remark in *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997), refusing to "accept the ... view that a refusal to transfer is automatically outside Title VII." We decline to do so.

6The Supreme Court's decision in *White* expanded the definition of an "adverse employment action" for claims brought pursuant to Title VII's anti-retaliation provision. *Id.* at 2415 (holding that Title VII's retaliation provision covers all retaliatory "employer actions that would have been materially adverse to a reasonable employee or job applicant," and stating that such actions are deemed "materially adverse" if they "could well dissuade a reasonable worker from making or supporting a charge of discrimination"). Because *White* was limited to the retaliation provision of Title VII, the Court's holding does not affect our foregoing discussion of adverse employment actions in the context of Momah's discrimination claim.

Appendix C

No. 06-368.
SUPREME COURT OF THE UNITED STATES

Davidson Momah, Petitioner

v.

Cari M. Dominguez, Chair, Equal Employment Opportunity Commission, et al.

January 8, 2007, Decided

JUDGES: Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito.

OPINION

On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Burlington N. & S. F. R. Co. v. White*, 548 U.S. ___, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006).

Appendix D

No. 03-2561

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Davidson Momah,
Plaintiff - Appellant,
v.
Cari M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants - Appellees.

Filed 4/17/06

JUDGES: Before GUY, BATCHELDER, and JOHN R. GIBSON, * Circuit Judges.

Upon consideration of the appellant's motion for leave to file an AMENDED petition for rehearing,
It is ORDERED that the motion be and it hereby is
It is further ORDERED that the original petition for rehearing the Amend petition for rehearing be and they hereby are DENIED.

Footnotes

* The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

Appendix E

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March 15, 2006, Filed

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COUNSEL: For DAVIDSON MOMAH, Plaintiff - Appellant: Elaine R. Carlis, Sherbow & Mitchell, Pleasant Ridge, MI.

For CARI M. CARI M. DOMINGUEZ, CHAIR, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL

EMPLOYMENT OPPORTUNITY COMMISSION, Defendant - Appellee: Peter A. Caplan, Asst. U.S. Attorney, U.S. Attorney's Office, Detroit, MI.

JUDGES: Before GUY, BATCHELDER, and JOHN R. GIBSON, * Circuit Judges.

OPINION BY: JOHN R. GIBSON

OPINION: JOHN R. GIBSON, Circuit Judge.

Davidson Momah appeals the district court's grant of summary judgment in favor of his employer, the EEOC, on his claims of discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. We affirm.

Davidson Momah, who is black, was born and raised in Nigeria. He came to the United States in 1980 to attend college and later obtained his law degree. In April, 1994, he began working as an investigator in the Detroit, Michigan office of the EEOC. During his three years as an investigator in Detroit, Momah received periodic promotions and favorable evaluations from his supervisors. In early 1997, Momah applied for and was selected to fill a vacant Administrative Judge position in the EEOC's Memphis, Tennessee office.[1] When Momah moved to Memphis his wife and daughter remained in Detroit, but it was his intention that they would join him in Memphis once he found a house for the family. However, in June 1997, Momah was hospitalized after being physically assaulted by a white supremacist at a gas station. Traumatized by the attack on her husband and fearful of further attacks, Momah's wife became unwilling to relocate to the South, and she

demanded that he request to be transferred back to Detroit. Although Momah initially refused, he eventually relented when his daughter began to experience health problems.

While visiting his family over the 1997 Christmas season, Momah met with officials at the Detroit office to discuss the possibility of a hardship transfer to a vacant Administrative Judge position in Detroit. The director of the Detroit office, James Neely, told Momah that although he would like to bring him back, he did not have the authority to do so. However, Neely did explain the process by which Momah could request a transfer through EEOC headquarters in Washington, D.C. On Neely's advice, Momah sent a letter to headquarters requesting a hardship transfer to Detroit. When Ralph Soto at EEOC headquarters received the request, he contacted Walter Grabon, the director of the Memphis office where Momah was then working as an Administrative Judge. Grabon opined to Soto that Momah's request should be denied. By letter dated February 3, 1998, EEOC headquarters notified Momah that it "was unable to grant [the] request for reassignment to the Detroit District Office at this time." The letter, signed by Soto, stated that the denial was "due to the current workload and staffing levels in the Memphis District Office" and that the requested reassignment "would not serve our current operational [*4] needs," although it did inform Momah that headquarters would "be happy to reconsider your transfer request if there is a change in the [Memphis office's] workload and staffing situation."

Around the time of the denial, Momah met with Grabon, who told Momah that he would need him

around for at least six months to help reduce the backlog at the Memphis office before Grabon would support any reassignment request. Momah reluctantly agreed to this arrangement. Approximately six months later, Momah again met with Grabon to discuss the possibility of a hardship transfer. By this time, Momah's daughter had been diagnosed with scoliosis, a condition requiring treatment by specialists in Detroit and Chicago. Momah showed Grabon a letter that he later sent to EEOC headquarters recounting his daughter's medical problems and pleading for urgent action on his transfer request. In the letter Momah stated his willingness to transfer to any position in Detroit, including a temporary assignment as an Administrative Judge or even into his former position as an investigator. Momah also promised to pay his relocation expenses and offered to take, the cases assigned to him for processing in Memphis with him to Detroit if he were permitted to go. Grabon told Momah not to bother making the request because it would not be approved, but that he should contact headquarters directly about the matter. During the conversation Momah informed Grabon that he was aware that a white male Administrative Judge had been granted a hardship transfer from EEOC headquarters to the Little Rock office of the EEOC in order for him to be closer to his adopted son. Grabon told Momah not to believe rumors about transfers of other EEOC employees.

Sometime after Momah submitted the transfer request to headquarters, Neely convened a meeting at the Detroit office to discuss Momah's request. In attendance were Andrew Sheppard, deputy director of the Detroit office and Gail Cober, enforcement manager in Detroit. Sheppard, a black male, told Neely that he

had no problem with Momah's returning to Detroit, but Cober, a white female, objected. Momah claims that following this meeting, Cober and Administrative Judge Mimi Gendreau, another white female in the Detroit office, began mounting pressure on Neely to convince headquarters to deny Momah's transfer request. Like Cober, Gendreau objected to Momah's return and [*6] voiced her objections to Sheppard and Neely, even going so far as to tell Sheppard that she would rather resign than ever work with Momah again.

While his request was pending in August 1998, Momah flew to EEOC headquarters to meet with Soto in person to discuss the possibility of a transfer. Momah relayed his daughter's health condition, his willingness to accept any assignment in the Detroit office including a temporary detail or. an investigator position, and his willingness to bear his own relocation expenses. However, Soto told Momah that Detroit did not need any additional staff due to low inventory. Following the meeting with Soto, Momah went to the office of Elizabeth Thornton, one of Soto's superiors, to discuss his situation. After listening to his concerns, Thornton told Momah that the low inventory in Detroit made a transfer there impossible. She suggested that Momah consider a transfer to the Indianapolis office, since it was closer to Detroit than Memphis, just to keep his options open.

In a letter dated September 8, 1998, Momah's second request for a hardship transfer was formally denied. The letter, signed by Soto, stated that a transfer as either an Administrative Judge or as an investigator in the Detroit office would "not be possible ... at this time." It indicated that Momah's request had been discussed

with Neely, who had determined that "a reassignment [to the Detroit office] is not commensurate with the district's needs." According to Soto, he had asked one of his subordinates, Marilyn Hayes, to contact Neely regarding Momah's request. According to Hayes, Neely told her that "the Detroit office did not want [Momah] back" and "he was not welcome back" because "they had had problems with him when he had been there." After learning that his request had been denied, Momah contacted Neely directly. Neely admitted to Momah that headquarters had contacted him about Detroit's inventory, but that the ultimate decision of whether to grant or deny his transfer request was made out of headquarters. In October, Momah met with Neely personally at the Detroit office, and Neely again told Momah that he was not responsible for the denial and that all he did was inform headquarters about inventory levels at the Detroit office. Later in October, Momah contacted Soto and asked if he would reconsider the denial. Soto told him, "Mr. Momah, you are not going to Detroit." In November, Momah met with Grabon, who denied any role in the denial and told Momah to take up the issue with Neely and headquarters. In the ensuing months Momah had a number of conversations with Grabon about his desire to transfer to Detroit during which he informed Grabon that he believed "what they were doing to [him] was discriminatory."

In September 1999, approximately one year after Momah's second request for a hardship transfer had been denied, Momah learned that a white investigator, Daniel Dushman, had been granted a hardship transfer to the Detroit office. Dushman was an investigator in the Detroit office during the time Momah had worked

there. In early 1999, Dushman had requested and was granted a hardship transfer from Detroit to the EEOC office in Alberquerque, New Mexico. Less than seven months later, Dushman wrote to Thornton at EEOC headquarters requesting a hardship transfer back to Detroit on account of family problems. Despite his being demoted while working as an investigator in Detroit and his acknowledged performance problems at the Alberquerque office, Dushman's transfer request was approved. After learning of Dushman's transfer, Momah contacted [*9] numerous EEOC officials in late September and early October 1999 to renew his request for a transfer. He contacted Jacqueline Bradley, the director of field management programs, and Marilyn Hayes, both at EEOC headquarters, to determine the status of any vacancies in the Detroit office, as well as the current inventory levels there. He made similar inquiries of Neely in the Detroit office. According to Momah, the officials informed him that the situation had not changed since his initial request and that his request continued to be denied.

On or about October 13, 1999, Momah initiated contact with an EEO counselor, claiming that the denials of his transfer requests were discriminatory. After the informal process failed, Momah filed a formal complaint with the EEO on November 24, 1999, claiming that his repeated requests for a transfer had been denied on account of his race, color, national origin, gender, and disability, and in retaliation for his exercise of rights protected under Title VII. Momah's complaint also alleged that the EEOC, for discriminatory and/or retaliatory reasons: (1) revoked, in September 1998, an offer to transfer him to an Administrative Judge position in Indianapolis; (2) in November 1998 rated his

performance as "proficient" instead of "outstanding"; (3) delayed his promotion from GS 13 to GS 14 from December 1999 to January 2000; and (4) delayed his promotion from GS 12 to GS 13 from December 1998 to February 1999. The EEO notified Momah by letter dated May 26, 2000 that the agency was not accepting for investigation claims (1), (2) and (4) for failure to initiate contact with an EEO counselor within forty-five days after they occurred. However, the EEO accepted for investigation his claims regarding the denial of his transfer requests and the delay of his most recent promotion and informed him that his denial of transfer claim was being treated as a continuing violation.

During the course of the EEO investigation, Momah learned that the EEOC had granted several requests from white females to transfer while his requests were still pending. Deborah Barno, a trial attorney in the Detroit office, was assigned temporarily to the vacant Administrative Judge position in Detroit. During the time that Momah's transfer request was pending, Judith Fournalik requested and was granted a hardship transfer from the New York EEOC office to an investigator position in the Detroit office in order for her to be closer to the law school in Ohio she was then attending. In addition, Linda Stankovich was allowed to return to the Detroit office to a different position than the one she had previously held, and Tina Hoffman, who had earlier resigned her position as budget analyst in the Detroit office, was allowed to return on a contract basis.

In April 2000, the EEOC offered Momah a transfer to an Administrative Judge position in the Indianapolis office of the EEOC in order for him to be closer to his

family. Momah accepted the transfer and moved to Indianapolis. He claims that he did so based on representations by EEOC officials that the transfer to Indianapolis was temporary and that he would be transferred to Detroit as soon as a position became available there. Momah was unhappy in Indianapolis, describing his experience there as "a nightmare" due to conflicts with his supervisors over his use of personal time to travel to Detroit to see his family. During his time in Indianapolis, Momah periodically renewed his request for a transfer to Detroit. He sent a letter dated May 25, 2000 to Elizabeth Thornton at EEOC headquarters requesting a hardship transfer from Indianapolis to Detroit. On June 9, 2000 Momah, accompanied by his attorney, traveled to EEOC headquarters to discuss his request with Jaqueline Bradley. While acknowledging the difficulty of Momah's personal situation, Bradley told Momah that a transfer to Detroit would not be possible due to budgetary constraints and the lack of a vacancy in the Detroit office. Momah's attorney inquired as to the likelihood of a transfer to the Cleveland office or back to Memphis, but Bradley rejected both requests: the former on the basis that the Cleveland office was overstaffed, the latter due to budgetary reasons. By letter dated June 27, 2000. Elizabeth Thornton informed Momah that his request for a hardship transfer from Indianapolis to Detroit was denied on the grounds that there were no funded vacancies in the Detroit office. By letter of July 14, 2000 to Thornton, Momah requested that she reconsider the earlier denial, and by letter dated August 20, 2000, he again requested a hardship transfer. Thornton responded by letter dated August 24, 2000 that the situation had not changed and that there continued to be no vacancies in the Detroit office.

Momah took a medical leave of absence for depression and work-related stress in approximately September 2000; he returned to work as an Administrative Judge at the Indianapolis office on April 9, 2001. Shortly after his return, the EEOC received funding to permanently fill the Administrative Judge position in Detroit to which Debra Barno had been assigned on a temporary basis. Momah applied for the position and was considered along with the other applicants. However, he was not selected; instead, Neely selected Debra Barno for the Administrative Judge position. In October of 2001, Momah was granted a transfer from the Indianapolis office back to the Memphis office as an Administrative Judge. However, after accepting the transfer, a disagreement erupted between Momah and EEOC headquarters over who would bear the costs of relocation and when Momah was expected to report for duty. Shortly after this disagreement, Momah notified headquarters that he was rejecting the transfer to Memphis, stating that "it is in my best interest to remain in the Indianapolis District Office until all the issues raised in my complaints are resolved either by an impartial official within the [EEOC] or before the federal court."

Following the investigation into Momah's complaint, n1 the EEOC issued its Final Action on June 4, 2002. It affirmed the EEO's refusal to investigate Momah's untimely claims, but went on to address the merits of his claims that (1) since January 1998 he has been denied a hardship transfer to Detroit and that (2) his promotion was delayed, all on account of his race, color, national origin, gender, disability, and in retaliation for his engaging in activity protected under Title VII. With respect to his disability discrimination claim, the EEOC

concluded that Momah had failed to establish that he was a qualified individual with a disability. With respect to his retaliation claim, the EEOC concluded that he failed to make out a prima facie case because he presented no evidence that those involved with his transfer or promotion were aware that he had engaged in any protected activity. The EEOC concluded that Momah had failed to establish a prima facie case of discrimination on account of race, color, or national origin on his denial of transfer and delay of promotion claims because he failed to present evidence that employees not in a protected class were treated more favorably than he. On his delay of promotion claim, the EEOC concluded that Momah had also failed to make out a prima facie case because he failed to show that he suffered an adverse employment action in that he received his promotion on the first day he was eligible. With respect to his denial of transfer claim, the EEOC concluded that, even if Momah could make out a prima facie case of discrimination, he failed to present evidence that the agency's reason for denying his transfer--namely that there were no available positions in Detroit--was a pretext for discrimination.

Momah filed the present complaint against the EEOC in federal court on August 30, 2002, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000, et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 791; 42 U.S.C. § 1983; the Westfall Act, 28 U.S.C. § 2679(b)(1); the Federal Tort Claims Act, 28 U.S.C. § 2673; unspecified "EEOC Rules and Regulations"; Washington D.C. Civil Rights Law; as well as breach of contract claims under Michigan and Washington D.C. common law. The EEOC filed a motion to dismiss, [*16] which the district court denied as to the Title

VII and Rehabilitation Act claims, but granted as to the remaining claims. Following discovery, the EEOC moved for summary judgment. The district court issued a bench opinion following a hearing and a written order the following day granting the EEOC's motion for summary judgment in its entirety. This appeal followed.

We review the district court's grant of summary judgment de novo. Johnson v. Kroger Co., 319 F.3d 858, 864 (6th Cir. 2003). In reviewing summary judgment, we look at the record in the same fashion as the district court, Guarino v. Brookfield Twp. Trustees, 980 F.2d 399, 403 (6th Cir. 1992), and our review "is limited to the evidence before the district court when it ruled." Campbell v. Potash Corp. of Sask., Inc., 238 F.3d 792, 797 (6th Cir. 2001). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We view all evidence before us in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A genuine issue of fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once the movant has pointed to evidence in the record showing that there are no genuine issues of material fact, the non-moving party must respond setting forth specific facts showing there is a genuine

issue for trial. Guarino, 980 F.2d at 405 (quoting Rule 56(e)).

The EEOC argues and the district court concluded that Momah's failure to initiate timely contact with an EEO counselor bars his claim that the EEOC discriminated against him by denying his requests for a hardship transfer. A federal employee suing under Title VII must satisfy "rigorous administrative exhaustion requirements and time limitations." McFarland v. Henderson, 307 F.3d 402, 406 (6th Cir. 2002) (quoting Brown v. General Serv. Administration, 425 U.S. 820, 833, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976)). Relevant here is the requirement that an "aggrieved [federal employee] must initiate contact with an [EEO] Counselor within 45 days of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). Timely contact; with an EEO counselor is an administrative prerequisite to filing an employment discrimination claim in federal court. Horton v. Potter, 369 F.3d 906, 910 (6th Cir. 2004); McFarland, 307 F.3d at 406.

We conclude that even if Momah failed to initiate timely contact with an EEO counselor, the EEOC waived its untimeliness defense by addressing the merits of his denial of transfer claim at the administrative level without raising a timeliness objection. In a recent Title VII case by a federal employee, we held that "when an agency accepts and investigates a complaint of discrimination ... it does not thereby waive a defense that the complaint was untimely." Horton, 369 F.3d at 911 (citing Belgrave v. Pena, 254 F.3d 384, 387 (2d Cir.

2001); see also Ester v. Principi, 250 F.3d 1068, 1072 n.1 (7th Cir. 2001); [*19] Bowden v. United States, 323 U.S. App. D.C. 164, 106 F.3d 433, 438 (D.C. Cir. 1997); Rowe v. Sullivan, 967 F.2d 186, 191 (5th Cir. 1992); Boyd v. United States Postal Serv., 752 F.2d 410, 414 (9th Cir. 1985)). However, we recognized that waiver would occur "when the agency decides the complaint on the merits without addressing the untimeliness defense." Id. (citing Ester, 250 F.3d at 1071-72; Bowden, 106 F.3d at 438). Here, although the EEO addressed the untimeliness defense with respect to three of the five claims in Momah's formal complaint, it decided the merits of Momah's denial of transfer claim. Later, in its Final Action, the agency affirmed the untimeliness determinations as to three of the five claims, but again decided Momah's denial of transfer claim on the merits. It was only in support of its motion to dismiss Momah's federal complaint that the EEOC asserted that the denial of transfer claim was untimely. In these circumstances we conclude that the agency waived any timeliness objection, and therefore Momah's denial of transfer claim is properly before us. See Horton, 369 F.3d at 911; [*20] see also Ester, 250 F.3d at 1071-73 (discussing "strong policy considerations" underlying the rule that agency waives untimeliness defense by failing to address it at administrative level).

Title VII makes it unlawful for an employer "to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). A Title VII plaintiff may establish discrimination either by introducing direct evidence of discrimination or circumstantial

evidence supporting an inference of discrimination. Johnson, 319 F.3d at 864-65. Momah argues that he has presented direct evidence that his requests for a hardship transfer were denied for discriminatory reasons. "Direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." Id. at 865 (quoting Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir.1999)). Unlike circumstantial evidence, it "does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." Id. Direct evidence of discrimination "must establish not only that the plaintiff's employer was predisposed to discriminate . . . , but also that the employer acted on that predisposition." DiCarlo v. Potter, 358 F.3d 408, 415 (6th Cir. 2004) (quotation omitted).

Momah's purported direct evidence of discrimination consists of comments by Gail Cober and Mimi Gendreau regarding his African accent and his poor command of the English language. Viewing the evidence in the light most favorable to Momah, a jury could possibly conclude that Cober and Gendreau's comments were discriminatory. Nonetheless, Momah's contention that these comments constitute direct evidence of discrimination fails because neither Gober nor Gendreau were responsible for the allegedly discriminatory employment action--the denial of his transfer requests. Carter v. Univ. of Toledo, 349 F.3d 269, 273 (6th Cir. 2003) ("Comments made by individuals who are not involved in the decision-making process regarding the plaintiffs employment do not

constitute direct evidence of discrimination."); Hopson v. DaimlerChrysler Corp., 306 F.3d 427, 433 (6th Cir. 2002) (comments by manager lacking involvement in the decision-making process do not constitute direct evidence); Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 354-55 (6th Cir. 1998) ("An isolated discriminatory remark made by one with no managerial authority over the challenged personnel decisions is not considered indicative of age discrimination"). Momah responds that even if Cober and Gendreau did not have ultimate authority over his transfer requests, their vocal opposition to his return to Detroit so influenced Neely as to render them the de facto decisionmakers. However, this contention fails in two respects. First, the undisputed evidence demonstrates that although Neely had significant input into the decisionmaking process, the ultimate decision of whether to grant Momah's request was made out of EEOC headquarters in Washington D.C. Second, even if we were to assume that Neely's input was outcome-determinative, there is no evidence that Neely's input was affected by pressure from Cober and Gendreau, instead of simply reflecting his own views about the Detroit office's personnel needs. Because Momah has failed to present evidence that Cober and Gendreau were responsible for headquarters' denial of his transfer requests, their comments, no matter how insensitive, cannot constitute direct evidence that his requests were denied for discriminatory reasons.

Because Momah has failed to present direct evidence of discrimination, he must proceed under the burden-shifting approach first set out in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and later refined by Texas Dep't of Cmty.

Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Johnson, 319 F.3d at 865. Under this framework, the Title VII plaintiff must carry the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. DiCarlo, 358 F.3d at 414. The prima facie case creates a rebuttable presumption of discrimination requiring the defendant to articulate a legitimate, nondiscriminatory reason for the challenged action. Id. If the defendant meets this burden, the plaintiff must prove that the proffered reason was a pretext for unlawful discrimination. Id.

To establish a prima facie case under Title VII, Momah must demonstrate that (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) he was treated differently than similarly-situated, non-protected employees. DiCarlo, 358 F.3d at 415 (6th Cir. 2004) (quotation omitted). Undisputed evidence demonstrates that Momah is a member of several classes protected by Title VII: he is a black (race) male (gender) from Nigeria (national origin).2 Likewise, Momah produced evidence that he was qualified for both the Administrative Judge and investigator positions in Detroit to which he repeatedly requested transfer. Moreover, there is evidence from which a jury could conclude that non-protected, but similarly-situated, employees were treated more favorably than Momah. n3

Although Momah has established three elements of his prima facie case, he has not demonstrated that the denials of his requests for a purely lateral transfer were "adverse employment actions" actionable under Title

VII. We have previously held that an "adverse employment action" is one that results in a "materially adverse change in the terms and conditions of [plaintiffs] employment." Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999); Kocsis, 97 F.3d at 886. A "materially adverse" change in the terms or conditions of employment is typically characterized "by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Hollins., 188 F.3d at 662. Under this definition, it would appear that a purely lateral transfer or denial of the same, which by definition results in no decrease in title, pay or benefits, is not an adverse employment action. See Kocsis, 97 F.3d at 886, a conclusion consistent with the authority from our sister circuits. See, e.g., Williams v. R.H. Donnelley, Corp., 368 F.3d 123, 128 (2d Cir. 2004); O'Neal v. City of Chicago, 392 F.3d 909, 913 (7th Cir. 2004); Amro v. Boeing Co., 232 F.3d 790, 797-98 (10th Cir. 2000); LePique v. Hove, 217 F.3d 1012, 1014 (8th Cir. 2000); Brown v. Brody, 339 U.S. App. D.C. 233, 199 F.3d 446, 455-56 (D.C. Cir. 1999); Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999); Burger v. Cent. Apartment Mgmt, 168 F.3d 875, 879 (5th Cir. 1999); Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1448 (11th Cir. 1998). n4

Momah presents no evidence that he suffered a loss of pay, benefits, or title, or any alteration in his job responsibilities as a result of being denied a transfer to Detroit; instead he contends that the denial was adverse because it denied him the opportunity to be closer to his family. His argument raises the issue of whether the adversity of a given employment action should be judged based on an objective or subjective

standard. We have previously held that an "employee's subjective impressions as to the desirability of one position over another are not relevant" in determining whether the employee suffered an adverse employment action. Policastro v. Northwest Airlines, Inc., 297 F.3d 535, 539 (6th Cir. 2002); see also Strouss v. Mich. Dep't of Corr., 250 F.3d 336, 343 n.2 (6th Cir.2001) (explaining that "purely personal reasons for turning down a transfer are not sufficient to render a transfer an adverse employment action"); Reese v. State of Mich. Family Independence Agency, 31 Fed.App'x 172, 174 (6th Cir. 2002) (relying on Strouss to hold that "purely personal reasons for requesting a transfer are not sufficient to render its denial an adverse employment action."). Instead, we employ an objective test that considers whether the employment action at issue was "objectively intolerable to a reasonable person." Policastro, 297 F.3d at 539 (citing Kocsis, 97 F.3d at 886); Strouss, 250 F.3d at 342; see also Keeton v. Flying J. Inc., 429 F.3d 259, 264-66 (6th Cir. 2005) (applying objective test to determine whether lateral geographic transfer constituted adverse employment action). Our circuit's focus on objective indicia of adversity is consistent with the holdings of our sister circuits that an employee's subjective preference for one position over another is insufficient to render the denial of a purely lateral transfer an adverse employment action under Title VII. See, e.g., O'Neal, 392 F.3d at 913 (holding that a "purely subjective preference for one position over another" does not "justify trundling out the heavy artillery of federal antidiscrimination law" in a Title VII claim for the denial of a lateral transfer where "the two jobs were equivalent other than in idiosyncratic terms") (quotation and citation ommited); Williams, 368 F.3d at 128 (rejecting employee's denial of

transfer claim on grounds that employee's desire to return to Las Vegas where she still maintained a home was merely a "subjective, personal disappointment[]" insufficient to "meet the objective indicia of an adverse employment action"); Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532-33 n.6 (10th Cir. 1998) ("If a transfer is truly lateral and involves no significant changes in an employee's conditions of employment, the fact that the employee views the transfer either positively or negatively does not of itself render the denial or receipt of the transfer [an] adverse employment action").

Applying these principles to Momah's claim, we conclude that he has failed to produce evidence from which a jury could conclude that the denial of his request to be transferred to either an investigator or Administrative Judge position in the Detroit office would be adverse to a reasonable person. First, the record demonstrates that a transfer from Momah's position as an Administrative Judge in Memphis to the investigator position in Detroit would have constituted a demotion within the EEOC, which would lead a reasonable jury to conclude that Momah had suffered an adverse employment action if his request for a demotion had been granted. See, e.g., Williams, 368 F.3d at 128 ("Clearly, an employer's denial of a transfer request that would have resulted in a reduction in pay and the employee's demotion within the organization, without more, does not constitute an adverse employment action."). Second, Momah presents no evidence that the Administrative Judge position in Detroit differed in any way, save for proximity to his family, from the identical position he held as an Administrative Judge in Memphis, and thus fails to provide evidence from which a jury could conclude that

the Memphis position was objectively worse than the identical position in Detroit. Because Momah has not shown that he suffered an adverse employment action, he fails to establish a prima facie case. n5

Momah argues that the district court "abused its discretion by completely ignoring all of [his] evidence in support of his retaliation claims." Title VII prohibits retaliation by an employer where an individual has engaged in protected activity. 42 U.S.C. § 2000e-3(a). A plaintiff can establish retaliation under Title VII without direct evidence under the burden-shifting approach set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See, e.g., DiCarlo, 358 F.3d at 420. Under this standard, Momah must first establish a prima facie case of retaliation by showing that (1) he engaged in an activity protected by Title VII; (2) the defendant knew of the exercise of his rights; (3) the defendant took an employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. Id. If Momah can establish a prima facie case, the burden of coming forward with a legitimate, non-discriminatory reason for the adverse employment action falls upon the EEOC. Id. (quotation omitted). However, if the EEOC articulates a non-discriminatory reason, it is then Momah's burden to show that the EEOC's reasons are merely a pretext for retaliation. Id.

Momah points to four actions allegedly undertaken by the EEOC to retaliate against him for filing an EEO complaint: (1) delaying one of his promotions; (2) negatively rating his performance; (3) refusing to process his subsequent EEO complaints; and (4) failing

to grant his transfer requests. He fails to make out a prima facie case for any of these claims. First, with respect to the delay of promotion claim, Momah presents no evidence to rebut the EEOC's evidence that he received his promotion on the first day he became eligible, namely the one-year anniversary of his previous promotion. Second, with respect to the performance rating claim, the undisputed evidence demonstrates that Momah never received a negative performance rating; he consistently received mid-range performance ratings, which are not actionable adverse employment actions under Title VII. See Hollins., 188 F.3d at 662. Third, there is no separate cause of action for his claim regarding the EEOC's alleged failure to process his complaint, see, e.g., Jordan v. Summers, 205 F.3d 337, 342 (7th Cir. 2000) (holding plaintiff's claim that agency "botched the processing of her [EEO] complaint . . . does not state a claim upon which relief can be granted"); rather, if Momah was dissatisfied with the agency's handling of a complaint his remedy was to do precisely what he did here: proceed to federal court. Id. Lastly, with respect to his claim that the EEOC retaliated against him by failing to grant his transfer requests, as discussed above, the denial of a purely lateral transfer without more is insufficient to constitute an "adverse employment action" under Title VII. See Kocsis, 97 F.3d at 886.

The judgment of the district court is affirmed.

Footnotes

* The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

n1 An EEOC Administrative Judge hears and decides, at the administrative level, complaints brought by federal employees alleging unlawful discrimination by their employers.

Momah argued to the district court that he was discriminated against on account of disability in violation of the Rehabilitation Act. However, he does not raise this issue on appeal, and so has abandoned it. See Kocsis v. Multi-Care Mgmt. Inc., 97 F.3d 876, 881 (6th Cir.1996).

n3 The record demonstrates that: (1) Dan Dushman, a white male, was granted a hardship transfer to an investigator position in Detroit; (2) Deborah Barno, a white female, was assigned temporarily to the vacant Administrative Judge position in Detroit; (3) Judith Fournalik, a white female, was granted a hardship transfer to an investigator position in the Detroit office; (4) Linda Stankovich, a white female, was allowed to return to the Detroit office to a different position than the one she had previously held; and (5) Tina Hoffman, a white female, was allowed to return to the Detroit office on a contract basis after earlier having resigned. See Ercegovich, 154 F.3d at 352 (holding that comparables need not be identical; rather, they need only be similarly situated "in all of the relevant aspects").

n4 Momah urges us to reject this uniform authority based on the First Circuit's remark in Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997), refusing to "accept the . . . view that a refusal to transfer is automatically outside Title VII." We decline to do so.

n5 The Supreme Court's grant of certiorari to this circuit's en banc decision in White v. Burlington Northern & Santa Fe R. Co., 364 F.3d 789 (6th Cir. 2004), to resolve a split among the circuits as to the scope of an adverse employment action in the context of a Title VII retaliation claim, see Burlington Northern & Santa Fe R. Co. v. White, 126 S. Ct. 797, 163 L. Ed. 2d 626, 2005 WL 3272153, 74 U.S.L. W. 3130 (2005), does not call for a different result here, as the job transfer at issue there was not a purely lateral transfer, it was a demotion; the position from which the employee was transferred was "objectively considered a better job." White, 364 F.3d 789, 803-804.

Appendix F

32-73544

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Davidson Momah,
Plaintiff,
v.
Cari M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

On September 11, 2003, Defendant filed a motion for summary judgment. On October 24, 2003, after hearing oral arguments, this Court granted Defendant's motion for summary judgment. An order to this effect was entered by the Court on October 30, 2003. On November 7, 2003, Plaintiff filed the motion for reconsideration which is now before the Court.

The issues before the Court on this motion are whether Plaintiff made a showing: (i) of a reason justifying relief from this Court's judgment, and (ii) of a palpable defect by which the court was misled, and that correction of the defect will result in a different disposition of the case, Sec E.D. Mich. L.R. 7.1(8)(3); FRCP 60.

Pursuant to Federal Rule of Civil Procedure 60, on motion and upon such terms as are just, the court

may relieve a party or a party's legal representative from a final judgment, order or proceeding for: (i) mistake, inadvertence, surprise or excusable neglect, (ii) newly discovered evidence, (iii) fraud, (iv) the judgment is void, (v) the judgment has been satisfied or (vi) any other reason justifying relief." See FRCP 60. Pursuant to Local Rule 7.1(8)(3), "[g]enerally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case." E.D. Mich. L.R. 7.1(g)(2)-(3).

Plaintiff clearly raises arguments which were previously considered and ruled upon by this Court. Accordingly, Plaintiff has failed to show a reason justifying relief from operation of the judgment or a palpable defect by which the court was misled. See FRCP 60; E.D. Mich. L.R. 7.1 (g)(3).

Therefore, Plaintiff s motion pursuant to Rule 7.1(g) of the Local Rules asking the Court to reconsider its Order granting Defendant's motion for summary judgment is hereby DENIED.

IT IS SO ORDERED.

Appendix G

32-73544

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Davidson Momah,
Plaintiff,
v.
Cari M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

IT IS HEREBY ORDERED THAT defendant's Motion for Summary Judgment is GRANTED, for the reasons that were stated on the record on October 20, 2003.

THE COURT: All right. Defendants' motion is this?
MR. CAPLAN: Defendants.
THE COURT: How are you? I haven't seen you in a long time.
MR. CAPLAN: Good morning. I'm well, Your Honor. It's good to see you. This is defendants' motion for summary judgment on a -
COURT REPORTER: Your name, please? I'm sorry.
MR. CAPLAN: Peter Caplan for the United States. Well, I guess it's for the Chair of the U.S. EEOC, the nominal defendant in this case.
THE COURT: Wait a minute. Are you all prepared to go forward?
MR. IBE: Yes. Good morning, Your Honor. Rickie Emmanuel The and Elaine Carlis.
MS. CARLIS: I'm Elaine Carlis, Your Honor, on behalf of the plaintiff.
Your Honor, there was just one matter that we could raise before the defendant starts his motion.
THE COURT: What is it?
MS. CARLIS: We have a motion in limine which may address some of the evidence that the defendant seeks to introduce in support of this motion.
THE COURT: Well, anything that is not an undisputed fact, of course, he couldn't rely on at any rate for his motion. I must -- I haven't seen a motion in limine, but it is not an appropriate one to consider at this time at any rate.
MS. CARLIS: Thank you, Your Honor.
THE COURT: Tell me if there are facts that are disputed that he's relying upon

MR. CAPLAN: The Court has no doubt been is aware of the fact that rather ample documents and briefing have been furnished to it, and therefore, I am not going to restate the whole ball of wax. I'm just going to try and highlight a couple of the major issues that I think are dispositive in this matter, Your Honor.

As I expect you are aware, Mr. Momah is an administrative judge with the EEOC. And the core of his complaint is as follows. He was an administrative judge in the Memphis office and he wanted to come to Detroit and that request was not approved.

By way of very brief background, Mr. Momah came to the EEOC from a job in, I believe it was Virginia. He left his family there, a daughter and a wife. They followed him to Detroit after a while. believe he started with the EEOC in Detroit in '94. He was an investigator. Sometime in 1997 he applied for a position as an administrative judge, a promotion from the investigator position.

The administrative judge position to which he applied was in Memphis. He was selected. He moved to Memphis. He left his wife and daughter back here in Detroit again. The plan apparently was that the wife and daughter eventually would follow him to Memphis. That plan did not eventuate.

According to Mr. Momah, he had a very disturbing experience in Memphis where was attacked by what he describes as a white supremacist, I believe at a gasoline station in Memphis. In the meantime, his wife got cold feet about moving to Memphis. She decided she didn't want to move to Memphis and the daughter had some sort of physical problems, a broken ankle and scoliosis or curvature of the spine.

That being so, he decided he wanted to come back to Detroit. He asked for a reassignment, what he

calls a hardship transfer back to Detroit in 1998, I think less than a year after his transfer to -- or hiring in Memphis. That request was denied. There is no question it was denied. It was denied by letter February 3, 1998. It was crystal clear that his request to come back to Detroit was denied.

Now, the reason it was denied, among other reasons, was because there was no position for him here. Yes, there was an authorized position in Detroit of an administrative judge, but it was not funded. The way the government works when someone leaves a position, that doesn't mean an agency automatically gets to refill it. Washington has to approve it and fund it and that position was not funded. There was no position for him to come back to in Detroit.

He made another request to come back to Detroit. He broadened his request a little in the summer of '98, said I'll come either to administrative judge position or a -- or back to an investigator position. That transfer request again was denied. There's no question it was denied by letter of September 8, 1998.

Now, through deposition testimony and discovery, we have learned that the transfer or the request to the administrative judge position was denied for the same reason it was denied six months earlier, there was no position funded here for an administrative judge. They had one judge here. That was the only one who was funded to act.

As for the investigator position, the director here, a black individual named James Neeley, frankly said, "I don't want him back. He caused me nothing but trouble when he was here. I don't want him back to an investigator position."

So as of September of '98, Mr. Momah had to have known that his requests to come to back to

Detroit were denied. However, he first contacts an EEO counselor in October of '99, over a year later, and herein lies the primary argument that I wish to address here today, and that is, that the case is untimely. As the Court no doubt knows, in the federal sector, an alleged discriminatee, an employee who believes he's been the victim of discrimination prohibited by Title 7 or any one of a number of the other anti-discrimination statutes, must initiate contact with an EEO counselor within 45 days of the act about which he complains. He just didn't do it here. He did not complain to an EEO counselor within 45 days. He did not complain to an EEO counselor within a year. He complained to an EEO counselor 13 months later.

And the case law is quite clear that if a federal employee fails to timely initiate the EEO process administratively then a subsequent Title 7 case brought in federal court is subject to dismissal on timeliness grounds.

Now, the plaintiff has a couple of arguments that I'd like to briefly address. We cite the most recent Supreme Court decision on timeliness of administrative complaints in the Title 7 context, Morgan v. National Railroad Passenger Corp, which as you and I know, is AMTRAK v. Morgan. And the Court made it crystal clear that once a discriminatory act occurs, the time clock starts running.

Now, plaintiff has some rather involved and dictionary-laden arguments for why Morgan doesn't apply. I think plaintiff's argument holds no water. The question of whether an event or an action or whatever the other terms are, the matter alleged to be discriminatory, whatever term it is, it's crystal clear that you've got 45 days from when the act occurs,

regardless of how the regulation characterizes that action.

More importantly, plaintiff has no cases to support him on that argument. And defendant has cases to support her, that is, that Morgan applies to the federal sector. But even if there is no Morgan, and I suggest Morgan does apply, and I suggest that Morgan casts serious doubt on plaintiff's other argument that this is somehow a continuing violation, notwithstanding the fact that we have specific discrete acts in February of '98 and September of '98, but even if there is no Morgan, call it what you will, he had 45 days from the time of the actions and he didn't contact an EEO counselor.

Finally, he argues that he didn't know that those were discriminatory acts until a lot later when the light bulb goes on. That simply was not his testimony at deposition. If I could just get an exhibit, among the pile of everything we gave you, was something called -- I think it was Exhibit I, which is a letter that he wrote to the EEOC, a woman named Jacqueline Bradley in November of '99. And he says on the second page of that letter, about three paragraphs down, that in August of '98, he's referring to, he advised his director, and later a ,man in Washington, that he knew and has heard of several females and white administrative judges and attorneys who were transferred following their personal hardship requests, even though their hardships were less serious compared to mine. And his supervisor, his director told him, don't believe that rumor. So as of August of '98, the light bulb had clearly gone on in his head that this was, in his mind, discrimination.

And his deposition testimony along those lines was consistent, that is, he knew that in August of '98 he

was the victim of discrimination. That being so, Your Honor, I hate to use the term an open-and-shut case of untimeliness, and I believe the case should be dismissed on those grounds.

Now, there were numerous other claims at least set forth in the complaint about other acts of discrimination; an office he got didn't have an window in it, an office wasn't ready for him when he got to Memphis, an in-step increase was delayed a matter of weeks. But I don't see in his response any response to our arguments that those were clearly not acts of discrimination, that there is no genuine issue of material fact on those grounds. I don't see any argument contrary to ours.

So all we have is the timeliness issue that I wish to address the Court with. Mr. Momah has submitted an affidavit indicating that he has some 50 witnesses or so that he could call to trial that somehow are going to support his claim of discrimination. I don't think that the Court needs to have a trial in this case.

Now, unless the Court has any specific questions on anything I've said or anything else that's raised in the papers, I'll let Mr. Ibe speak.

THE COURT: All right. Thank you. You'll have rebuttal.

MR. CAPLAN: Thank you, Your Honor.

THE COURT: Defense?

MR. IBE: Good morning, Your Honor.

THE COURT: Good morning.

MR. IBE: May it please the Court, it's a pleasure to be up here before the Court once again, Your Honor.

Your Honor, I think counsel for the government has eloquently articulated their position, and similarly towards counsel for the government side, reference in the briefs and exhibits that were filed before the Court.

I will not overburden the Court with information that is contained in the brief itself, the exhibits.

However, I will address the key issue here. Clearly, Your Honor, there is a question of fact in this matter that is at dispute. And Counsel for the government, as eloquently as he had tried to shade the truth before this Court, you cannot really hide from what the truth is.

Yes, Judge Momah is an administrative law judge. Yes, Judge Momah was in Detroit as an investigator prior to going to Memphis. And yes, Judge Momah did request a hardship transfer back to Detroit. Counsel for the government obviously says -did not articulate well regarding the basis for that hardship transfer. Judge Momah's daughter was diagnosed with a serious spinal condition that could have resulted in some kind of paralysis while she was in Detroit.

He was in Memphis. Absolutely no way in the world he could care for his child from Memphis. The kid's doctor is here in Detroit. In fact, I go one step further. The doctor's in Detroit have recommended another physician or another hospital in Chicago for the child to be taken. And Judge Momah, as a caring father, commuted from Memphis to Detroit to Chicago back to Memphis just to care for his child. All of these conditions and all of these problems were made aware to his employer. The employer knew this. But employer merely turned the opposite eye. They did not care.

The hardship transfer that was requested here is nothing unusual, Your Honor. Within the EEOC, it is something that is normally done, but it has become a privilege of employment. There are so many instances of parties who were transferred back to Detroit who were similarly situated to Judge Momah. A good

example is Mr. Dan Dushman, someone that obviously the defense has failed to raise before the Court.

They claim that Mr. Momah was a troublemaker, that he had misconduct problems. However, Your Honor, those were not reasons he was denied a hardship transfer. There is evidence that has been filed with the Court along with tape recordings, Your Honor, that contradict everything that the defense has said before this Court. And just to make a note here now for the record, the tape recordings of these individuals, these officials have been made available to the defense counsel, but have refused, or failed to copy them or listen to those tape recordings, Your Honor, and we have those in the Court today as well. This just clearly tells us that these parties lied and they have lied, including in all of the affidavits they have submitted before the Court, because their, voice will clearly state what their true intent was, how they told Judge Momah he will never go back to Detroit.

Judge Momah could not, Your Honor, have known that he was being discriminated against until somewhere around September of 1999. He had continuously followed advice of senior government officials such as James Miller, Mr. Grabon, Mr. Soto. They're telling him, you do this and you do that. He continuously did those things in order to see if he could get a transfer.

At some point, based on an exhibit that counsel for the government presented before you, the Exhibit I, my client was told to disregard the information regarding all those things he's been hearing about other people being transferred, that that was simply a rumor, that those things are not true. Well, you don't rush and file a complaint based on mere allegations that cannot be substantiated. My client is an attorney and a judge

for that matter and he knows that. He had no way of knowing, whether this -- that this information were actually true or whether they were just rumors or fabricated lies.

Not until September of 1999, when he became aware, clearly aware that this information, these other parties were being transferred, that was when he decided to file that complaint in October of 1999.

The defense argument that my client's complaint is untimely is simply not true, Your Honor. My client relied on the advice that he was given by the same officials who set out to mislead him. Obviously they had their intent, Your Honor. The intent was, let's mislead this man enough, just maybe we'll find a way to claim that, "Oh, you did not bring your claims timely."

The truth of the matter is, Your Honor, and the factual basis that his claim dispute here is, why would Judge Momah be given the position of an administrative law judge in Memphis, Tennessee if he is grossly incompetent, if he had misconducts such as the ones described by the defendant? I hope the agency is not saying that they like to promote incompetent and people who commit misconduct to positions of power and authority, because if that's the case, then may God save those who come before those agencies, Your Honor.

Secondly, why would the agency tell Mr. Momah that he should stay in Memphis because of the inventory in Memphis, that if he reduces the inventory down, he'll be transferred. I'm sure that a reasonable juror would like to hear the answers to those questions. Why would the agency not reveal to Mr. Grabon or Judge Audrey Scott, when Judge Momah applied for the position in Memphis, that he had misconduct problems. That has never been answered. I'm sure that

a reasonable juror would like to hear the answers to that question.

Why did Mr. Grabon treat defendant differently than from other candidates who were selected for administrative law judge. Why would he investigate my client?

Well, let the record reflect, Your Honor, that my client was well investigated by Mr. Grabon before he reluctantly agreed for him to become a judge in Memphis. If there were anything that were derogatory about my client's performance or competency level, that would have been raised and that would have prevented him from becoming a judge in Memphis. But that was not the case.

I believe those things, Your Honor, raise questions of fact, questions that both the plaintiff and the defendant clearly disagree on right now. Those are issues that the jury has the right to listen to and make a determination.

There are so many other things that were raised by counsel in their brief, Your Honor, that we also addressed, in our brief, but I would like to point out one important issue, that is, the issue regarding the parties in Detroit, Gail Cober and Mimi Gendreau. Ms. Gail Cober disliked my client. She disliked him so much that she was not willing to have him come back to Detroit. My client, Your Honor, there's no secret, he's an African-American originally from Nigeria. He speaks with an accent such as that of counsel. There is no secret about it. He cannot hide from the person that he is. And yet Mr. Grabon, Ralph Soto and everyone within the agency claim they didn't know his background. It is like asking someone to disregard the American flag that is before this Court, because it's crystal clear that my client speaks with an accent. Ms.

Gail Cober once said that someone who speaks with an accent should not represent the government of the United States. That is an outrage. That, Your Honor, is an outrage.

Andrew Sheppard in his deposition contradicts everything that the defense has put forward. Andrew Sheppard was a deputy district director under Mr. Neeley. Andrew Sheppard testified that if Mr. Neeley wanted he could have given the position to Judge Momah. There was nothing preventing him from giving Judge Momah that position. Mimi Gendreau and Gail Cober clearly stated they did not want him back there. Mr. Neeley did not have sufficient amount of working experience with Judge Momah to make a determination regarding his conduct.

They claim my client had problems. Mr. Dushman was a supervisor, yes, in Detroit. However, Your Honor, what the defense will fail to tell you is that Mr. Dushman was demoted because of lack of good performance. Mr. Dushman had a problem when he was transferred to Albuquerque. He could not perform in Albuquerque, yet he requested a transfer on hardship back to Detroit. Well, guess what? They let him back in.

They even threw a party for him, Your Honor. How can a man -- obviously Mr. Dushman is a white male, that had a problem in Detroit, he was demoted. His performance level was not even close to my client. In fact, during the deposition of Gail Cober, she clearly attest that my client, while he was an investigator in Detroit, outperformed every other investigator for the same kind of cases that he did.

Well, it is understandable, Your Honor, that my client may have more complaint from, of course, the general public, because he did more work. That's not unusual. And everyone in the department has said it's

not unusual to have people complain about investigators.

But Mr. Dushman was welcomed back with open arms despite all the problems he had in Detroit, despite all the problems he had in Albuquerque. Your Honor, I believe that the jury would like to hear that. Why would a white male be treated so differently? Mr. Dushman is the perfect person that should be used to compare Judge Momah, because they were on the same level here in Detroit when he left Detroit.

There are so many other things that I would like to point out to Court, however, I think it would be belaboring everything that we have already put down on paper. I will allow the Court to make a determination, and that determination, Your Honor, should be that this case should be allowed to go to the jury. There is no doubt that if the jury hears the information that is contained within these briefs and exhibits itself, they will come to the conclusion that Judge Momah was, in fact, discriminated against. Thank you, Your Honor.

THE COURT: Excuse me. What was his disability?

MR. IBE: Judge Momah had -- there are two things, Your Honor. Thanks for that question, Your Honor. Judge Momah had a heart condition that required him to take medications. That heart condition based on his doctor's -- the prognosis that was given to him was exacerbated by the stress of his child's illness and the stress at work, that one day while he was at work, Judge Momah actually passed out at Indianapolis and was taken to the emergency room. Frankly, he did not even know where he was.

These doctors were so afraid for his condition that they said he needs to get away from his job until he is good enough to go back.

And secondly, while this may not have been decided by the Courts, his child's disability, the illness of his child is also a disability, Your Honor, that can be imputed to him, because he is the father of that child and he is also responsible for that child. Those two information regarding his heart condition, as well as the illness of his child was clearly aware to his employers. They knew this. They did not accommodate him, Your Honor.

That's the disability that he had, Your Honor.

THE COURT: Thank you.,

MR. IBE: Thank you, Your Honor.

THE COURT: Brief rebuttal, brief.

MR. CAPLAN: I don't believe there's any evidence that anybody in Detroit who was making the decisions or anybody in Washington knew about this heart condition, and I don't believe that any condition his daughter had makes him a handicapped individual within the meaning of the anti-discrimination statutes.

Briefly, with regard to Dan Dushman, he came back as an investigator. He wasn't applying for the administrative judge position that plaintiff wanted to come back to. By the time Dushman did come back in September of '99, by that time plaintiff had withdrawn his request to come back as an investigator. He wanted to come back as an administrative judge, a position that was not filled when Washington gave an approval until 2001.

How did he get the job in Memphis if he did such a bad job in Detroit? Because Memphis failed to call Detroit. Happens -- bad job by Memphis.

Finally, he didn't know until '99 he claims that he was the victim of discrimination. I would ask the Court to take a look at paragraph 17, I believe, of what he calls his consolidated affidavit in response to the motion for summary judgment. And if that's not clear enough, pages 138 through 140 of his volume 2 of his deposition, I will just be very brief,

"But you felt that he had some --" and "he" is Walt Grabon, his district director in Memphis, who he claims orchestrated the denial of his transfer back to Detroit.

"You felt he, Walt Grabon, he didn't think the same of you that he thought of other white people?"
Answer,

"Yes."

"You knew that as of August of '98?" "Yes."

"Because as of August of '98 you had spoken with Grabon and he sort of tore into you and said 'don't bother making a second request, it would not be approved,' and he said that rather angrily, right?"
Answer,

"Yes."

"And he really didn't have any reason to be angry at you, did he?"

"No."

"And you feel that, you know, at least was an ingredient in your mind that this man is a
bigot?"
Answer,

"Yes "

"And you knew that as of August of '98, right?"
Answer,

"Right."

Et cetera, et cetera.

This plaintiff clearly knew at least as of August of '98 in his mind that he was the victim of illegal discrimination. Similarly

THE COURT: What did the affidavit say?

MR. CAPLAN: I don't have that with me, but it suggests -- it states something along the lines of well before November of '99 or October of '99 he was aware that the -- that in his mind these actions were motivated by anti -- by discrimination. Thank you.

I threw everything into the briefcase I thought I would need and, of course, the one thing I thought I needed

THE COURT: Well, it does appear on the undisputed facts of record in this case that the Court must grant the full summary judgment which is requested by the plaintiff -- by the defendant.

First of all, the plaintiff was informed that his request for transfer had been denied in February and September of 1998. 29 C.F.R. requires that the plaintiff should have made contact with the EEO counselor within 45 days of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action.

The plaintiff did not contact a counselor until October of 1999. Under the Morgan case, his complaints were clearly untimely, and the evidence does not support his claims here that he had no awareness of the discriminatory basis alleged against his supervisors. He, clearly on the undisputed facts, was aware of the fact that he had some basis in discrimination for the claims he was going to make within the 45 days required by Morgan.

Also, an ALJ position did not exist at the time he was seeking his transfer to that. And as for the investigatory position, the defendants have presented

substantial legitimate reasons for not granting the plaintiff that position.

In addition, he has failed to present evidence of any similarly situated employee who was granted reassignment to an administrative judge position in Detroit during the time period during which he was requesting a transfer. So his motion for summary judgment on that issue alone must be granted, the defendants' motion.

On the disability act claim, the summary judgment motion of the defendant must be granted. The plaintiff has failed to present any evidence that he suffered from a disability and that his employers or the active persons among his employers knew anything of a disability or the disability that he claimed.

And of course, his child's disability, if it indeed exists, cannot be imputed to him.

His claims for discriminatory action having occurred while he was in Indianapolis are subject to summary judgment because there is no evidence or real argument to refute the defendants' undisputed contentions regarding all the claims regarding discrimination while there.

In Memphis, summary judgment must be granted on his claims because the performance rating of proficient which he was given in 1998 appears to be supported on the record and the claim is untimely, of course, because it did not occur until -- well, he did not contact the counselor for more than a year after the rating had occurred. But there is no evidence that he deserved a rating higher than proficient in 1998.

Summary judgment has to be granted concerning Grabon's propensity to discipline the plaintiff. Actual evidence has suggested that there is no record of discipline against the plaintiff, and

furthermore, that white administrative judges have been disciplined. So there is no evidence presented to raise a question of fact as to that claim.

The chairwoman's award claim is subject to summary judgment as well. The plaintiff has not pointed to any evidence that his supervisor discriminatorily prevented him from obtaining the chairwoman's award. There is no evidence that he merited that award or that a similarly situated employee outside of his protected class received such an award.

Summary judgment is also granted on his claim of delay of promotion. He was granted a promotion soon after his supervisor recommended him for it. And there is no credible evidence or no evidence offered to contradict the defendants' undisputed factual allegations in that regard.

The summary judgment is granted concerning obstruction of the processing of the EEO complaint. The plaintiff has failed to raise any question of fact supporting that claim and the undisputed facts suggest that it is not so. So no discrimination claim may be brought concerning processing of the EEO complaint.

Finally, the retaliation claim is subject to summary judgment because the plaintiff has failed to establish a causal connection between his filing of an EEO complaint and being denied a hardship transfer. Without that element, there can be no claim, and therefore, summary judgment must be granted on that claim.

So for those reasons, the defendants' motion for summary judgment must be granted in its entirety. Is there an order?

MR. CAPLAN: No, but I will present one, Your Honor.

THE COURT: Thank you.
MR. IBE: Thank you, Your Honor. THE COURT: Thank you.
(Court-in recess at 10:44 a.m.)

Appendix I

Answers to Investigator's Questionnaire
EEO Complaint No. 0-0000003-ME
witness: Audrey M. Scott
Supervisory Administrative judge Memphis District office

EXHIBIT 1

1. Question: was Complainant due for a promotion on or around December 7, 1999? Explain in detail. was his promotion delayed? Explain in detail.
a. Yes, Mr. Momah was eligible for promotion on or around December 7 1999. This is the reason 1 submitted a memo to Mr. Walter S. Grabon, District Director, on November 22, 1999, recommending Mr. Momah for promotion to the GS-14 level. At the time, Mr. Momah had been a GS-13 for slightly less than one year. However, I knew that the one year time in grade restriction did not apply because Mr. Momah held an excepted service position, as opposed to a position in the competitive service.
b. sometime after submitting the recommendation(i am not sure of the exact date), Ms. Doris woods advised me that Mr. Momah's promotion would be delayed because of the time in grade restriction. During this conversation, I reminded Ms. Woods that the time in grade restriction was not applicable to excepted service positions such as that of an administrative judge. Ms. Woods then said that she would check with Minnie Johnson, the Administrative officer, and get back with me later. Later, Ms. Johnson called and told me that Mr. Momah would have to wait until February

2000 to get promoted because he had not held an attorney position before coming to EEOC.

2. Question: were you on a medical leave of absence during December and January of 1999, during the time Complainant was due for a promotion? Explain in detail. During your medical leave of absence from work, do you recall talking with Mr. Grabon concerning Complainant's promotion to GS-14? Explain in detail. Did you concur with Mr. Grabon that Complainant should wait for your return from your leave of absence for his promotion? Explain in detail.

ANSWERS:

a. No, I was not on medical leave during December and January 1999.

I had been on medical leave the year before, from October 23, 1998 to January 4, 1999. During that time, Mr. Momah became eligible for promotion to a GS-1.3. Ms. woods was in charge of the Hearings unit during my absence, and was responsible for all personnel actions including promotions.

b. During my leave of absence, I never, at any time, spoke with Mr. Grabon about Mr. Momah's promotion or about an one else's promotion. I did not speak to Mr. Grabon at all during my absence from work.

c. No. As stated above, Mr. Grabon and I did not have any conversations during my medical leave of absence.

3. Questions: Did you during a conversation with Mr. Grabon approve a promotion of a white female Administrative Judge? Explain in detail and identify this employee by name, race, and grade. Did you a prove the white female's promotion while you were on medical leave of absence? Explain in detail. was complainants promotion due before his white female coworker? Explain in detail.

Answer:

a. No, I did not approve or recommend the promotion of a white female. During my medical leave, I did not have any conversations with Mr. Grabon or Ms. Woods regarding the promotion of a white female Administrative judge.

b. The employee in question is Barbara Kimmelman, Gs-13. Ms. Kimmelman, a white female, was hired as a GS-11 Administrative Judge in June 1998.

c. No. Ms. Kimmelman's promotion to a GS-12 was never discussed with me. Therefore, I was not able to approve or disapprove her promotion. Ms. Kimmelman was promoted to the GS-12 level in November 1998, when i was out on medical leave. when I returned to work in January 1999, Ms. Doris Woods, the Deputy Director, gave me the appraisals she had completed during my absence. At that time, Ms. Woods informed me that she had promoted Ms. Kimmelman to the GS-12 level during m absence. In addition, Ms. Woods stated that Ms. Kimmelman could be promoted to the GS13 level in three months because she was in an excepted service position. Later, I told Ms. Woods that I had some misgivings about promoting Ms. Kimmelman to the Gs-13 level so soon because I was extremely concerned about her production during my absence. Ms. Kimmelman had closed less than fifteen cases during the quarter I was absent from work. I told Ms. Woods that I needed more time to observe Ms. Kimmelman's performance before making any promotion decisions. Ms. Woods then assured me that this was my decision to make.

c. Mr. Momah was promoted to the GS-12 level in November 1997, and was due for promotion to the GS-

13 level in November 1998. His promotion was due before Ms. Kimmelman's promotion.

4. question: Did Mr. Grabon need your approval before promoting an Administrative Judge under your supervision? Explain in detail: Do you know of any AJs who were promoted by Mr. Grabon without your approval? Explain in detail and identify each person by name, race, sex, national origin and disability.

Answer:

a. Theoretically, Mr. Grabon does not need my approval to promote AJ's . He is, after all, the director of the office. However, Mr Grabon does not directly supervise the AJ's, and is not aware' of their performance on a daily basis. i, as the immediate supervisor, have intimate knowledge of AJ's performance, and I am in a better position to decide if promotion is warranted. Therefore, I make the recommendations for promotions of AJ's in the Hearings unit.

b. I do not know if Mr. Grabon initiated Ms. Kimmelman's promotion or not. As stated, Ms. Woods told me that she had promoted Ms. Kimmelman. Mr. Grabon may have concurred in this decision. The only AJ who has ever been promoted without a recommendation from me is: Barbara Kimmelman, white, female, American, no disability as far as I know.

Appendix J

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Q: Okay.Thank you, Judge. Now, prior to offering the position to Davidson Momah did you do any kind of background check such as contacting prior supervisors in the Detroit District?

A: Yes.

Q: All right. Could you please tell us specifically what that entails?

A: I contacted the - it was someone - I don't think I told you the candidates I would be contacting, references, their supervisors, whomever in the office to get some information about them.And I recall that with Davidson I contacted the -- I believe that person - and I can't recall his name right now. He was the deputy director in Detroit.

Q: Would that be Andrew Sheppard?

A: Yes, I contacted him concerning Davidson. And I'm not sure whether he was aware that Davidson had applied for the position, but we did speak about Davidson's performance and all of that.

Q: Okay. Now, when you contacted the Detroit District, did they recommend David for the position?

A: Yes.

Q: Okay. Did anyone from the Detroit District raise

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Q: Is it your testimony before that no one raised any issues prior to you making your decision - no, I'm sorry. Strike that.

Is it your testimony that nobody from the Detroit District raised any issues of concerns regarding David's performance or conduct before you made your decision to hire him?

A: No, no one.You're correct about that.There was no issue raised concerning his performance conduct. (A brief discussion was had off the record.)
BY MR. IBE:
Q: All right. Now, at the time you recommended judge Momah for the position in Memphis did anyone oppose Judge Momah's selection at the Memphis District?
A: In the Memphis District office?
Q: Yes.
A: I made the recommendation, because -- this was a very well thought out selection process, recommendation process, because I was comparing the qualifications of the candidates to the skills that I felt were necessary in that position, given the nature of the position.
Q: Okay.
A: And Davidson floated to the top of the list. I
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A: As I stated, Doris Woods was the deputy director. She was my supervisor. She had responsibility for the unit and she did those evaluations.
Q: Okay. She conducted an evaluation for Davidson Momah and that of the other judge, that would be Barbara Kimmelman
A: Right. And, of course, we had a legal technician in the unit, Priscilla Anderson.
Q: Okay. Was Judge Barbara Kimmelman promoted in 1998?
A: Now, I found out about that upon my return. I returned to work on January 4th, 1999 off medical leave, and at the time I spoke to Doris Woods .And Doris told me that she had evaluated Barbara and Davidson during my absence, and she gave me a folder I believe with the appraisals.

And she also said that Davidson had been asking about his promotion, but that he hadn't I done anything with that.And she also advised me that Barbara had been promoted to the next grade in the career ladder and that, of course, she said 1 Barbara was -- because they were in the excepted service, Barbara didn't have to wait the year and she would be - she could be promoted to the next level within 90 days or something to that effect.

Q: What about David, did she tell you why he was not promoted?

A: No.

Q: Could she have promoted David as well?

A: Yes.

Q: But she did not?

A: She did not.

Q: Okay. Now, Barbara'a promotion to the next level that you described, is that something that was higher than David's position?

A: No.

Q: I'm sorry?

A: No. No, it was not.

Q: Okay.At what level were they hired in, Barbara and David?

A: Both of them were hired in at the lowest possible level I believe which was a Grade 11.

Q: Grade 11?

A: Um-hmm.

Q: All right. So when Barbara was promoted she was promoted to - would that be Grade 11,12 then?

A: That would have been a Grade 12.

Q: While David remained at Grade 11?

A: Davidson had been hired before Barbara. He was already a Grade 12.

Q: He was already a Grade 12?

A: Right. He was trying to get promoted to Grade 13.
Q: Okay. Based on your testimony earlier and the information that you know in your capacity throughout your time at the EEOC could Walt Grabon and Doris Woods have promoted Davidson while you were out on medical leave?
A: Well,they could have promoted Davidson while I was away. He was due for promotion. He could have been.
Q: Now, did you recommend Judge Kimmelman for promotion before you left on medical leave?
A: No.
Q: Do they need your recommendation for promotion of judge Kimmelman or Davidson Momah?
A: No, I don't think so, because apparently they did not obtain it. Usually you talk to the supervisor before you promote.
Q: But Walt Grabon or Doris Woods, none of them called you before promoting Barbara Kimmelman?
A: No, they did not call me at all.
Q: Now, let me divert a little bit. We're going to get back to the promotion issue. Let's go to the production. Now, did you testify earlier that the judges are assigned production quotas?
A: They are not - they were not assigned quotas per se. It's a very complicated situation.The union would have been all over management had they told a judge or any other professional in the office that you have to close ten cases this month or something to that effect.
The way we did it -- because the office had a production requirement.The way we did it, we gave them time frames for processing cases. I believe the union or it could have been Federal Labor Relations Authority that said we could do that. So we would assign -- at least I would assign the judges time frames for

processing cases when I assign the cases and basically saying these cases should be completed and closed by such and such a date.

And so that's how we determined really their productivity, looking at how they responded to the time frame.

Q: Okay. Now, based upon what you just described to us, how would you describe - strike that.

How would you compare Judge Momah's productivity to that of Barbara Kimmelman?

A: Actually, there was no comparison. Davidson was a very productive person within the unit. He led the unit in terms of the cases that he processed.

And I believe at that time, the time that we're talking about, around in November or December 1998, as I stated Barbara had just come into the unit around in June of that year, I believe.And she was having problems adjusting to the type of work that we did, because she had to come in and learn a totally different area of law, and plus be able to do it in a timely fashion. Although there were no official production requirements, I mean you couldn't sit there and do nothing.You had to produce, and that's why I say it's a very complicated issue.

Barbara was struggling, and Davidson was basically leading the unit. And I think this time that I was away Davidson was responsible for continuing Barbara's training. So he was providing a lot of assistance

Q: (Interposing) I'm sorry.We didn't get the last part of the sentence. Davidson was responsible for continuing Barbara's -

A: Right. He was continuing Barbara's training. He took on that responsibility during my absence promoted within the 90-day period because, of course, we were in the excepted service and didn't have to wait for one

year before being promoted. And so that would be considered fast track, that you go 90 days, every 90-day period you get another promotion. And I basically said no, I didn't think Barbara deserved that.

Q: Was Judge Momah ever promoted to level G-13?

A: Pardon?

Q: Did there come a time when Judge Momah was promoted to Level G-13?

A: Let me explain that.When I got back to the office in January and - now, let me backtrack on that. Davidson had called me at home before I came back and he appeared to be very upset. And he told me. that he had not - his promotion hadn't come through to the next level. And I was quite surprised at that, because I - you know, and I didn't think he was-- you know, I said, well, maybe you could be mistaken, because he I said something about Barbara being promoted. Well, when I got back to the office, Doris told me that this had indeed occurred.

So at that point the first thing I did was to make a recommendation for Davidson's promotion. And I think initially I may have sent an E-mail to Doris recommending Davidson for promotion.And Doris E-mailed me back and said, well, print that out, because it has to be printed out or something in hardcopy or something like that, so I did.

And Doris contacted me again and said, well, something about complaint or something to that effect, that I had to address something. I forgot what she said. And I remember doing that, too.And I still insisted that he be promoted to the next level.And he was promoted, but this was sometime I know after I returned in January.

Q: Okay. And when did that promotion take effect, the G13?

A: I don't know when it took effect. Usually what I did was made the recommendation and they took care of everything from that point on.

Q: All right. Did you recommend Judge Momah for another promotion in December of 1999?

A: Yes.

Q: Okay.Was he promoted?

A: I don't remember when that date was.There did come a time when I made a recommendation for Davidson to be promoted to Grade 14 level.And again, I said that was sent to Doris Woods. And I'm not sure, it could have been in November of 1999, that I recommended Davidson to promotion to a Grade 13.

Q: Okay.You mean Grade

A: (Interposing) I did and I - Doris E-mailed me. She may have told me in-person, I'm not sure how this occurred, that Davidson could not be promoted then because he had not been in grade for one year. And so she said that Minnie Johnson was saying

something to that effect.

And I pointed out to Doris, well, you know Davidson is in the excepted service and there's no requirement that you remain in grade for one year.

And so then later on I got – it could have been an E-mail from Minnie Johnson. It could have been a memo in memo form stating that Davidson could not be promoted to - well, he had I to wait the entire year, because - how did they put it? He was not working as an attorney with EEOC or something like that prior to being hired as an administrative judge, although he was an attorney and member of the Bar. I don't know where Minnie got that from' because I don't think that it's not reflected anywhere in OPM rules or anything, but this is what Minnie said. And I think from the wording of the memo or the E-mail it was clear to me that the

personnel technician had also taken the view that he didn't have to wait the entire one-year period.
Q: Okay.
A: Because I think Minnie made reference to that, but she said something about not being an attorney prior to -- not being an attorney with EEOC.
Q: Okay. Now, did Walt Grabon-
A: (Interposing) The year period had been extended, because Davidson did not get his promotion, in fact, until around February of 1999.1 think that's when it was. So if it's one year then it would be February of 2000. He may have gotten it then. I'm not sure. But she said that they weren't going to do it then.
Q: All right. What about Judge Kimmelman was she ever promoted to grade level -
A.13?
Q: Yes.
A: Yes, she got a promotion to a 13. I recommended her to 13 later on when her performance improved. It was within I think a year after she had been
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the stress involved in that position. I was the chief basically. It's a very stressful situation. It was causing a lot of health problems for me. Also, as I stated, I had not been there since - I was working,from home.They allowed me to work from home from February up until the time that I actually retired. I had made a request for disability retirement through the Office of Personnel Management.That could have been January or February. I'm not sure what the date was that I made the request.
So it was well-known and Doris was aware that I would not be there any longer and they knew that they had to replace me. And so I wasn't upset about that or anything, because I knew that they had. And we later

got word from OPM some months later. I think this is prior to June that my request had been approved.
Q: Okay.
A: And then later I think the last thing I did for EEOC was around in June. I went to Washington, D.C. to be a panelist at the administrative judge training conference, and that's where I met Zia personally. I had talked to her over the phone.
Q: Do you know if Judge Momah, Davidson Momah,ever applied for the position to replace you?
A: Yes. Doris told me that Davidson had applied.
Q: Now, was Judge Momah's name on the cent?
A: No.
Q: Was Judge Momah interviewed by the panel?
A: No.
Q : Okay. Who set up the panel?
A: I have no idea.
Q: Okay. Do you know what standard was used to determine those who will be on the cert?
A: I don't know.You have to ask Minnie Johnson that.
Q: Now, in the course of you meeting with the panel regarding judge Zia, Z-i-a did you find out any information concerning judge Zia's credentials?
A: Yes. Zia had been an administrative judge for the EEOC in the early years, because I think at that time I was one of the oldest administrative judges in the country, not in terms of years, but I had been there almost since the beginning.And Zia was with the first group of administrative judges they hired back in 1979. I was part of that group.
And Zia had been hired and was working in Charlotte, North Carolina, somewhere in North Carolina. But Zia left the Commission later in the '80s sometime. And at the time that she applied for the position Zia was

working as a writer with the Social Security Administration in North Carolina.

MR. MOMAH: Rickie?
MR. IBE: Yes.
MR. MOMAH: Let me talk to you. (Briefly off the record.)

BY MR. IBE:
Q: All right. Judge Scott, I appreciate your patience with us. I will not be - I will not take up too much time anymore. I have just a few more questions left.
A: Okay.
Q: And then I will let Mr. Caplan proceed with his cross-examination. So please bear with me for a few more minutes.
A: Okay.
Q: Thank you. We were on the issue of Judge Zia prior to the brief break.
Were you surprised that judge Momah's name was not on the cert?
A: Was I surprised.?
Q: Yes.
A: I was because Doris had told me he had applied. i And he was not on the certificate and I didn't - as I said, Minnie Johnson is the one who prepares the certificate. I don't know what criteria she used. I think you have to ask her about that.
Q: Okay.Was Judge Momah qualified to do the job in Memphis?
A: To do the job?
Q: Yes. Could Judge Momah have done the job?
A: Well, what job? As the supervisor of the unit?
Q: Yes.

A: Yes, he could. Now, Davidson - by that time Davidson had been in hearings for some time and had established a pretty good record up there in Indianapolis.

Q: Do you know if Walt Grabon, Ms. Woods or Minnie Johnson, did they take any steps to find out background information concerning Judge Zia before judge Zia was hired

A: Whether they did. No.That was the job of the panel.

Q: Okay. And did the panel do that?

A: Yeah, we did. I think with Zia - I didn't do it personally, but as a panel we talked. And I believe there had been some discussion with Zia's EEOC supervisor.

And let me say that Zia after she

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Q. Did anyone specifically ask you whether or not Davidson could return back to Detroit, that you recall?

A. The only conversation along those lines that I recall is a conversation I had with Walt Garbone. Walt called me on some other issue and Davidson's name came up. He said – he asked me something like "Why don't you let me tell Davidson you just don't want him? And I said, "Well it's unnecessary, because I don't have a vacancy." That was basically the conversation.

Q. When he said you just don't want him, what does that mean?

A. Well, I had told him previously, when we talked in March of 1998, about some of the things I knew about Davidson, and I teased him because he never called me to ask me for my opion of Davidson before he hired him. So, we shared a few stories—

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Appendix L

U.S. Equal Employment Opportunity Commission
Detroit District Office.

Memorandum

To: Dorothy J. Porter
District Director

From: James R. Neely, Jr.
District Director

Date: April 30, 1998

Subject: Transfer of 30 Hearings Cases

Per our agreement, the following cases are being transferred to the Cleveland District Office

1.	*** v. USPS	230-97-4194X
2.	*** v. DOT	230-97-4188X
3.	*** v. USPS	230-97-4172X
4.	*** v. USPS	230-97-4171X
5.	*** v. VA	230-97-4170X
6.	*** v. DOJ	230-97-4161X
7.	*** v. USPS	230-97-4085X
8.	*** v. DEA	230-98-4083X
9.	*** v. USPS	230-98-4081X
10.	*** v. USPS	230-98-4080X
11.	*** v. DOT	230-98-4079X
12.	*** v. DOT	230-98-4074X
13.	*** v. USPS	230-98-4071X
14.	*** v. USPS	230-98-4070X

15.	*** v. USPS	230-98-4066X
16.	*** v. USPS	230-98-4050X
17.	*** v. USPS	230-98-4059X
18.	*** v. USPS	230-98-4060X
19.	*** v. USPS	230-98-4053X
20.	*** v. USPS	230-98—4043X
21.	*** v. USPS	230-98-4031X
22.	*** v. USPS	230-98-4032X
23.	*** v. USPS	230-98-4030X
24.	*** v. USPS	230-97-4185X
25.	*** v. USPS	230-98-4024X
26.	*** v. USPS	230-98-4025X
27.	*** v. USPS	230-98-4009X
28.	*** v. USPS	230-98-4004X
29.	*** v. USPS	230-98-4002X
30.	*****	230-98-4107X

U.S. Equal Employment Opportunity Commission
Detroit District Office

Memorandum

To: Chester V. Bailey
District Director

From: James R. Neely, Jr.
District Director

Date: November 1, 1999

Subject: Transfer of 10 Hearings Cases

Per our agreement that your office will accept 50 cases from the Detroit Hearing Unit, the following 10 cases are being transferred to the Milwaukee District Office. All cases are within one hour of Grand Rapids, MI. This is the second set of 10 cases that has been sent to your office. An additional 10 cases will be forwarded to your office in January 2000.

1.	*** v. SSA	230-99-4019X
2.	*** v. USPS	230-99-4096X
3.	*** v. USPS	230-99-4107X
4.	*** v. USPS	230-99-4125X
5.	*** v. USPS	230-99-4132X
6.	*** v. USDOC	230-99-4142X
7.	*** v. USPS	230-99-4151X
8.	*** v. SSA	230-99-4155X
9.	*** v. USPS	230-A0-4015X
10.	*** v. USPS	230-A0-4018X

Appendix M

State of Michigan
Probate Court
County of Oakland

Address Correction Requested
Davidson Momah
22484 Bill Court
Farmington MI 48335-0000

Re: Whitnie Momah Adult
Conservatorship/00267213

Dear Davidson Momah

You have been appointed as fiduciary by the court in the above-captioned matter. This is an important responsibility and must be fulfilled completely. You should become familiar with legal requirements and applicable court rules. Enclosed is a pamphlet for your guidiance. Although unable to give you legal advice, our staff will answer questions or direct you to someone who can help.

Sincerely,
s/Hon Barry M. Grant
s/Hon. Linda S. Hallmark
s/Hon. Edugen Arthur Moore
s/Hon. Sandra G. Silver
Probate Judges

Appendix N

RELEVANT PROVISIONS INVOLVED

42 U.S.C. Section 2000e-3 (a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicant for employment,....., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Civil Rights Act of 1964 as amended[1] (42 U.S.C Section 2000e et. Seq) Section703 (a)
provides:

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[1]It is important to note that:

> The 1964 Act did not, at the outset, apply to the federal government. In 1972, the Act was amended by Public Law No. 92-261, making for the time that discrimination on the bases of race, color, sex, religion, and national origin in the federal government was prohibited by statute. Prior to that time, Executive Order 11478 prohibit discrimination in the federal employment. Responsibility for enforcement was delegated to the now defunct Civil Service Commission." Ernest C. Hadley, *A Guide To Federal Sector Equal Employment Law and Practice*, P. 913, Dewey Publishing, Inc., (16th edition 2003).

> It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 706 states:

> (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704.
>
> (b) Whenever a charge is filed by or behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint

labor-management committee (hereinafter referred to as the "respondent") within ten days and shell make an investigation thereof.

In addition to the above applicable rules, Federal Rules Of Civil Procedures, Rule 56 {C} permits summary judgment only "If the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The evidence, and any inferences concerning the facts, must be viewed in the light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U. S. 574, 587 (1986).

5-14-08

No. 07-991

In the Supreme Court of the United States

DAVIDSON MOMAH, PETITIONER

v.

NAOMI C. EARP, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Solicitor General
Counsel of Record

GREGORY G. KATSAS
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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Chair of the Equal Employment Opportunity Commission (EEOC) was entitled to summary judgment on petitioner's claim that the agency discriminated against him in violation of Title VII of the Civil Rights Act of 1964.

2. Whether the court of appeals correctly held that the EEOC was entitled to summary judgment on petitioner's claim that the agency retaliated against him in violation of Title VII.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Alvarado v. *Texas Rangers*, 492 F.3d 605 (5th Cir. 2007) 14
Bouman v. *Block*, 940 F.2d 1211 (9th Cir.), cert. denied, 502 U.S. 1005 (1991) 9, 11
Boykin v. *City of Mobile*, 180 F.3d 271 (11th Cir. 1999) 15
Burlington Northern & Santa Fe Ry. v. *White*, 126 S. Ct. 2405 (2006) 7, 10, 11, 12, 17
Clark County Sch. Dist. v. *Breeden*, 532 U.S. 268 (2001) 16, 17
Fallon v. *Meissner*, 66 Fed. Appx. 348 (3d Cir. 2003) 15
Higgins v. *Gonzales*, 481 F.3d 578 (8th Cir. 2007) ... 11, 14
Kocsis v. *Multi-Care Mgmt., Inc.*, 97 F.3d 876 (6th Cir. 1996) 13
Ledergerber v. *Stangler*, 122 F.3d 1142 (8th Cir. 1997) .. 13
Marrero v. *Goya of P.R., Inc.*, 304 F.3d 7 (1st Cir. 2002) 12, 13
McCoy v. *City of Shreveport*, 492 F.3d 551 (5th Cir. 2007) 11
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 6

Cases—Continued: Page

Mt. Healthy City Sch. Dist. Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 16
Randlett v. *Shalala*, 118 F.3d 857 (1st Cir. 1997) 9, 11, 12
Schultz v. *Alticor/Amway Corp.*, 177 F. Supp. 2d 674 (W.D. Mich. 2001), aff'd, 43 Fed. Appx. 797 (6th Cir. 2002) 10
Simas v. *First Citizens' Fed. Credit Union*, 170 F.3d 37 (1st Cir. 1999) 13
Von Gunten v. *Maryland*, 243 F.3d 858 (4th Cir. 2001) 9
Wilkie v. *Robbins*, 127 S. Ct. 2588 (2007) 16, 17
Williams v. *Bristol-Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996) 14, 15

Constitution, statutes and rule:

U.S. Const.:
Amend. I 16
Amend. XIV 16
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... *passim*
Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.* 5
Sup. Ct. R. 35.3 5

In the Supreme Court of the United States

No. 07-991

DAVIDSON MOMAH, PETITIONER

v.

NAOMI C. EARP, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-27a) is not published in the *Federal Reporter* but is reprinted in 239 Fed. Appx. 114. The orders of the district court granting respondents' motion for summary judgment (Pet. App. 56a) and denying petitioner's motion for reconsideration (Pet. App. 54a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2007. A petition for rehearing was denied on September 27, 2007 (Pet. App. 1a-2a). On December 5, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 25, 2008, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a black native of Nigeria who emigrated to the United States in 1980. Pet. App. 4a. He began work for the Equal Employment Opportunity Commission (EEOC) in April 1994 as an investigator in its Detroit, Michigan office. *Id.* at 4a-5a. In 1997, petitioner applied for and received a position as an administrative judge in the EEOC's Memphis, Tennessee office. *Id.* at 5a. Shortly after his move to Memphis, petitioner was hospitalized after a white supremacist assaulted him at a gas station. *Ibid.* Petitioner had originally planned for his wife and daughter to join him in Memphis, but as a result of the attack, his wife refused to move and demanded that he return to Detroit. *Ibid.* Petitioner at first refused, but ultimately decided to seek a hardship transfer back to Detroit when his daughter began experiencing health problems. *Ibid.*

In a letter dated February 3, 1998, EEOC headquarters informed petitioner that it was unable to grant his transfer request. Pet. App. 6a. After consulting with the director of the Memphis office, the reviewing EEOC official determined that the needs of that office were too great for petitioner to leave. *Id.* at 5a-6a. The letter stated that the EEOC would "be happy to reconsider [petitioner's] transfer request" if there were a change in workload and staffing at the Memphis office. *Id.* at 6a. The Memphis director explained to petitioner that, due to the office's backlog, his continued presence would be necessary for at least six months, and petitioner "reluctantly agreed to this arrangement." *Ibid.*

Approximately six months later, petitioner met again with the Memphis director. Pet. App. 6a. Petitioner's daughter had been diagnosed with scoliosis. *Ibid.* Petitioner expressed his willingness to accept any position in Detroit, including temporary administrative judge or even investigator. *Ibid.* Petitioner submitted a second transfer request to EEOC headquarters, and traveled there to discuss his concerns with agency officials. *Id.* at 7a. They informed him that the low workload in Detroit rendered a transfer there impossible, but suggested that he consider a transfer to Indianapolis, which would bring him closer to Detroit. *Id.* at 7a-8a.

In a September 8, 1998, letter, agency headquarters formally denied petitioner's second request for a transfer to Detroit on the ground that such a transfer "would 'not be possible . . . at this time.'" Pet. App. 8a. In the months following the denial, petitioner began to complain to the Memphis director that he was receiving discriminatory treatment. *Id.* at 9a. In September 1999, roughly a year after the denial of his second transfer request, petitioner learned that a white investigator, who had previously moved from Detroit to Albuquerque, had received a transfer back to Detroit for family reasons despite a history of performance problems. *Ibid.* Petitioner renewed his request for a transfer, asking headquarters officials and the director of the Detroit office about vacancies and workload in Detroit. *Ibid.* Petitioner asserted that agency officials informed him that the situation had not changed, and continued to deny his transfer request. *Id.* at 9a-10a.

In October 1999, petitioner contacted an equal employment opportunity (EEO) counselor, alleging that the transfer denials were discriminatory. Pet. App. 10a. On November 24, 1999, he filed a formal EEO complaint,

claiming that the agency had discriminated against him on the basis of race, color, national origin, gender, and disability, and had retaliated against him for the exercise of protected rights. *Ibid.* In April 2000, the agency offered petitioner a transfer to an administrative judge position in Indianapolis, which he accepted. *Id.* at 11a. Petitioner claims that he accepted the transfer based on agency officials' representations that he would be transferred to Detroit as soon as a position became available. *Ibid.*

Petitioner sent another letter to EEOC headquarters on May 25, 2000, again requesting a hardship transfer to Detroit. Pet. App. 11a. He and his attorney wer to EEOC headquarters to discuss this latest request in person; EEOC informed him that a transfer would be impossible due to the Detroit office's budgetary constraints and lack of a vacancy. *Id.* at 11a-12a. The EEOC also responded negatively to oral inquiries regarding a transfer to Cleveland or back to Memphis, stating that the former office was overstaffed and the latter lacked a sufficient budget. *Id.* at 12a. On June 27, 2000, petitioner's most recent request for a transfer to Detroit was formally denied on the ground that no funded vacancies existed in that office. *Ibid.* Petitioner requested reconsideration and submitted yet another transfer request; in a letter dated August 24, 2000, the EEOC informed petitioner that Detroit's vacancy situation had not changed. *Ibid.* Petitioner then took a medical leave of absence for depression and work-related stress from September 2000 to April 2001. *Ibid.*

Soon after petitioner returned in April 2001, the EEOC received funding for a permanent administrative judge position in the Detroit office. Pet. App. 12a. Petitioner applied and was considered along with other ap-

plicants, but the EEOC eventually selected the candidate who had been filling the role on a temporary basis. *Ibid.* In October 2001, the EEOC granted petitioner a transfer back to Memphis as an administrative judge, which petitioner initially accepted but ultimately declined. *Id.* at 12a-13a.

On June 4, 2002, after completing its investigation, the EEOC issued its final action on petitioner's complaint. Pet. App. 13a. It held that several of his claims were untimely, and found no merit to his claims that, due to discrimination and retaliation for protected activity, (1) his hardship transfer requests to Detroit had been denied, and (2) his promotion from GS 13 to GS 14 had been delayed from December 1999 to January 2000. *Ibid.* The agency concluded that petitioner had not established that other similarly situated individuals had been treated more favorably or that any decisionmaker knew of any protected activity in which he had engaged. *Ibid.* The EEOC determined that petitioner had been promoted on the first day he was eligible and that, even if he could establish a prima facie case of discrimination, he had failed to show that the agency's reason for denying his transfer requests (*i.e.*, the lack of available positions in Detroit) was pretextual. *Id.* at 13a-14a.

2. On August 30, 2002, petitioner filed suit against the EEOC in federal court,[1] alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, and various other federal and state laws and regulations. Pet. App. 14a. The district court granted the EEOC's

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[1] Pursuant to this Court's Rule 35.3, the current Chair of the EEOC, Naomi C. Earp, is automatically substituted as the lead respondent.

motion to dismiss as to all but the Title VII and Rehabilitation Act claims. *Ibid.*

The court later granted summary judgment in favor of the EEOC on the remaining claims. Pet. App. 56a, 71a-74a. The court agreed that petitioner had not made a timely EEO complaint with respect to certain claims, and held that petitioner had presented insufficient evidence to support his various theories of discrimination and retaliation. *Id.* at 71a-74a. The court ruled that the transfer denials were not discriminatory, because (a) no funded administrative judge position existed in Detroit at the times petitioner sought it, (b) the EEOC had legitimate reasons for denying his request to transfer to an investigator position, and (c) petitioner had failed to show that similarly situated persons had been treated more favorably during the time that he was requesting a transfer. *Id.* at 71a-72a. The court also granted summary judgment in favor of the EEOC on petitioner's retaliation claim because he had failed to establish any causal connection between his protected activity and the denial of a transfer. *Id.* at 73a. The court denied petitioner's request for reconsideration. *Id.* at 54a-55a.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 30a-53a. The court held that the EEOC had waived its timeliness defense on petitioner's denial-of-transfer claim, *id.* at 42a, but it proceeded to conclude that petitioner had presented insufficient evidence to support that claim. The court first determined that petitioner had "failed to present any direct evidence of discrimination," *id.* at 45a, and then concluded that he could not establish a prima facie case of discrimination under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), Pet. App. 45a-47a. The court held that the EEOC's denials of a

transfer to Detroit could not amount to actionable "adverse employment action[s]" for purposes of a Title VII discrimination claim. *Id.* at 46a-50a. The court also affirmed the district court's grant of summary judgment on petitioner's retaliation claims. *Id.* at 51a. It rejected his claim that the agency had retaliated against him by denying his transfer requests, reasoning that "the denial of a purely lateral transfer without more is insufficient to constitute an 'adverse employment action' under Title VII." *Ibid.*

4. After the court of appeals issued its ruling, this Court decided *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). In *Burlington Northern*, this Court held that Title VII's anti-retaliation provision extends to any action that "a reasonable employee would have found" to be "materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (internal quotation marks and citations omitted).

Petitioner filed a petition for certiorari alleging, *inter alia*, that the court of appeals rejected his retaliation claim based on reasoning that conflicted with *Burlington Northern*. See Pet., *Momah* v. *Dominguez*, cert. granted, 127 S. Ct. 933 (2006) (No. 06-368). In response, the government acknowledged that a remand was warranted to permit the court of appeals to apply the *Burlington Northern* standard to petitioner's retaliation claim. See Resp. Br. at 9-10, *Momah*, *supra* (No. 06-368).[2] On January 8, 2007, this Court granted a writ of certiorari, vacated the judgment of the court of ap-

[2] The government argued, however, that certiorari should be denied on the second question petitioner presented, which alleged that the EEOC did not conduct a proper investigation of his EEO complaint.

peals, and remanded the case "for further consideration in light of" *Burlington Northern*. Pet. App. 28a.

5. On remand, the court of appeals affirmed the district court in an unpublished decision. Pet. App. 3a-27a. The court reiterated its prior ruling that the EEOC's denials of petitioner's transfer requests could not amount to actionable "adverse employment action[s]" for purposes of a Title VII discrimination claim. *Id.* at 20a-23a. The court found that its objective standard for determining whether a denial of a transfer constituted a "materially adverse change in the terms and conditions of employment" was consistent with the standard applied by other circuits. *Id.* at 20a-21a (internal quotation marks and citation omitted). The court held that, because *Burlington Northern* "was limited to the retaliation provision of Title VII," it did not affect its prior analysis "of adverse employment actions in the context of [petitioner's] discrimination claim." *Id.* at 27a n.6.

The court also reaffirmed the district court's grant of summary judgment on petitioner's retaliation claims. Pet. App. 25a. The court explained that, although *Burlington Northern* "changes our analysis regarding [petitioner's] retaliation claim, it does not change our conclusion that the district court's grant of summary judgment was proper." *Id.* at 4a. The court held that "even assuming, *arguendo*," that the EEOC's denials of petitioner's transfer requests qualified as adverse actions under *Burlington Northern*, petitioner "is still unable to establish a prima facie case of retaliation." *Id.* at 25a. The court found that petitioner could not establish a causal connection between his protected activity and the denials of his transfer requests. *Ibid.* The court noted that petitioner's initial transfer requests in February 1998 and August 1998 were denied before he had

even engaged in any protected activity. *Ibid.* Although the EEOC also denied transfer requests after petitioner engaged in protected activity, petitioner made "no distinction between the conduct of his employer before October 1999 and the allegedly retaliatory conduct." *Ibid.* The court accordingly held that "no causal nexus exists between the employer conduct and the protected activity." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 19-25) that this Court should grant certiorari to resolve a conflict between the unpublished decision of the court of appeals in this case and the decisions of other courts of appeals regarding what type of employer conduct qualifies as an "adverse employment action" sufficient to support a claim of discrimination or retaliation under Title VII. Petitioner articulates no actual conflict of authority in the circuits on this issue and petitioner's fact-based challenges to the court of appeals' unpublished decision do not otherwise warrant this Court's review.

a. Petitioner's allegation of a conflict is seriously undercut by the fact that he fails to distinguish between cases that address discrimination claims and those that address retaliation claims. Most of the court of appeals decisions that petitioner cites (Pet. 21-24) involve only retaliation claims. See, *e.g.*, *Von Gunten* v. *Maryland*, 243 F.3d 858, 863-864 (4th Cir. 2001) (addressing the definition of "adverse employment action necessary to prove a § 2000e-3 retaliation claim"); *Randlett* v. *Shalala*, 118 F.3d 857, 858 (1st Cir. 1997) (holding that "Title VII can offer protection against a *retaliatory* refusal to transfer an employee," but "no evidence existed here to show *retaliation*") (emphasis added); *Bouman* v.

Block, 940 F.2d 1211, 1229 (9th Cir.) (describing what constitutes "an adverse employment decision resulting from retaliation"), cert. denied, 502 U.S. 1005 (1991); see also *Schultz* v. *Alticor/Amway Corp.*, 177 F. Supp. 2d 674, 681 (W.D. Mich. 2001), aff'd, 43 Fed. Appx. 797 (6th Cir. 2002) (citing cases to show a circuit split about what constitutes "adverse employment actions" for purposes of retaliation claims under federal anti-discrimination statutes). But this Court's decision in *Burlington Northern* already resolved the circuit split regarding the proper standard for alleging actionable retaliation under Title VII. All of the cases upon which petitioner relies were decided before *Burlington Northern*, and thus, petitioner cannot show that a split among courts of appeals persists *after* that decision.

In fact, petitioner made an almost identical argument in his petition for certiorari from the court of appeals' first, pre-*Burlington* opinion in this case. Pet. at 13-22, *Momah*, *supra* (No. 06-368). As noted, this Court already granted certiorari, vacated the judgment, and remanded to the court of appeals "for further consideration in light of *Burlington N[orthern]*." Pet. App. 28a. Thus, petitioner has already obtained further review based on *Burlington Northern*. And the court of appeals' unpublished and fact-bound decision resolving this case in the wake of *Burlington Northern* does not merit further review.

b. Although some courts of appeals used to apply the same "adverse employment action" standard to both discrimination and retaliation claims, this Court squarely rejected that approach in *Burlington*. 126 S. Ct. at 2412-2413. As the Court explained, Title VII's "anti-retaliation provision, *unlike the substantive provision* [prohibiting discrimination], is not limited to dis-

criminatory actions that affect the terms and conditions of employment." *Ibid.* (emphasis added). The Court noted that in addition to the differences in language, the differences in purpose between the substantive anti-discrimination provision and the anti-retaliation provision supported its holding that the scope of the anti-retaliation provision is broader: "The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status," while the "anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Ibid.* Thus, neither a split in authority on the appropriate standard for retaliation claims (which, in any event, has already been resolved), nor this Court's holding in *Burlington Northern* regarding retaliation claims supports petitioner's argument that further review of his *discrimination* claim is warranted. See *McCoy* v. *City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (noting that *Burlington Northern*'s holding is limited to retaliation claims); *Higgins* v. *Gonzales*, 481 F.3d 578, 589 (8th Cir. 2007) (noting the different standards for discrimination and retaliation claims after *Burlington Northern*).

For this reason, petitioner's extensive reliance (Pet. 21-23) on the Ninth Circuit's decision in *Bouman* and the First Circuit's decision in *Randlett* is misplaced. Although those cases addressed whether a transfer or a denial thereof was actionable under Title VII, each of them involved only retaliation claims. See *Randlett*, 118 F.3d at 858, 862-864; *Bouman*, 940 F.2d at 1229. In *Bouman*, the court's discussion of the applicable standard—*i.e.*, that a plaintiff "must show that the [employer] took some action in response to her exercise of Title VII rights"—on its face is relevant solely to retaliation claims, 940 F.2d at 1229, and, more to the point,

has been superceded by this Court's later decision in *Burlington Northern*. 126 S. Ct. at 2415.

In *Randlett*, the First Circuit held that, in light of the facts of that particular case, it could not agree with the employer's view that "a refusal to transfer is automatically outside Title VII." 118 F.3d at 862. The court nonetheless affirmed the district court's grant of summary judgment to the employer because the plaintiff failed to produce sufficient evidence of retaliatory intent. *Id.* at 862-863. That holding does not create a conflict among the circuits regarding whether transfers or denials thereof can constitute actionable discrimination based on a prohibited characteristic under Title VII for several reasons: (1) it arose in the context of a retaliation claim;[3] (2) it is limited to the circumstances of that case; and (3) in any event, to the extent that pre-*Burlington Northern* retaliation cases remain relevant to the First Circuit's disposition of discrimination claims, post-*Randlett* decisions in the First Circuit are consistent with the standard that was applied by the court of appeals below.

In *Marrero* v. *Goya of Puerto Rico, Inc.*, 304 F.3d 7 (2002), for example, the First Circuit reversed a jury verdict in the plaintiff's favor on the ground that her transfer was not an actionable adverse employment ac-

[3] Although *Randlett* stated that Title VII's anti-discrimination and anti-retaliation provisions "[a]rguably * * * should be read together," 118 F.3d at 862, this Court rejected that approach in *Burlington Northern* and held that Title VII's anti-retaliation provision applies to a broader range of employer conduct than does its discrimination provision. 126 S. Ct. at 2412-2414. Although the court of appeals correctly noted below (Pet. App. 27a n.6) that *Burlington Northern* does not affect the standard applied to discrimination claims, any discussion of the proper standard for discrimination claims in *Randlett* is necessarily dicta because the court addressed only a retaliation claim.

tion as a matter of law. *Id.* at 23-25. The court cited *Kocsis* v. *Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996)—also relied upon by the court of appeals below (Pet. App. 20a)—for the proposition that "[r]e-assignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims." *Marrero*, 304 F.3d at 23 (quoting *Kocsis*, 97 F.3d at 885). Although the First Circuit noted that "courts have rejected any bright line rule that a transfer cannot qualify as an 'adverse employment action' unless it results in a diminution in salary or a loss of benefits," it held that the plaintiff had failed to produce sufficient evidence to "prove that, viewed *objectively*, this transfer was an adverse personnel action." *Id.* at 24-25.

Similarly, in *Simas* v. *First Citizens' Federal Credit Union*, 170 F.3d 37 (1999), the First Circuit explained that "[d]etermining whether an action is materially adverse necessarily requires a *case-by-case* inquiry," and that such inquiry "must be cast in objective terms." *Id.* at 49-50 (internal quotation marks and citation omitted). Accordingly, the First Circuit's case law, viewed as whole, is consistent with the holding of the court of appeals in this case that an objective test should be used to determine whether an employment action is sufficiently adverse to constitute actionable discrimination under Title VII. See Pet. App. 21a-22a. And, in any event, the First Circuit may have occasion to further clarify its case law in the wake of *Burlington Northern*.

c. Although petitioner cites some court of appeals decisions that involve discrimination claims, they fail to advance his argument. For example, he cites (Pet. 21) *Ledergerber* v. *Stangler*, 122 F.3d 1142 (8th Cir. 1997), for the proposition that unlike other circuits, the Fifth

and Eighth Circuits require a plaintiff to show an ultimate employment action in order to state a claim under Title VII. But the adoption of that standard—under which a plaintiff cannot proceed unless he has suffered an "ultimate employment action" such as a discharge, a failure to hire or promote, or a reduction in compensation—would not help petitioner. To the contrary, the "ultimate employment decision" standard is stricter than the Sixth Circuit's requirement that petitioner show a "materially adverse change in the terms and conditions of [his] employment." Pet. App. 20a (internal quotation marks omitted). Thus, even assuming that the Fifth or Eighth Circuit continues to apply an "ultimate employment decision" standard that differs in practice from the standard applied by other courts of appeals,[4] petitioner would not benefit from its application to his case.

Petitioner's citation (Pet. 24) of the Seventh Circuit's decision in *Williams* v. *Bristol-Myers Squibb Co.*, 85 F.3d 270 (1996), also fails to advance his claim. In *Wil-*

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[4] It is unclear to what extent, if any, the Fifth and Eighth Circuits continue to apply a stricter "ultimate employment action" standard. For example, in a recent decision that post-dates *Burlington Northern*, the Eighth Circuit analyzed whether a plaintiff's transfer was "an adverse employment action" without mentioning the "ultimate employment decision" standard; instead, it examined whether the plaintiff suffered a "material employment disadvantage." *Higgins*, 481 F.3d at 584 (internal quotation marks omitted). And while the Fifth Circuit continues to refer to the "ultimate employment decision" standard, it recently reiterated that "[t]o be equivalent to a demotion, a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement." *Alvarado* v. *Texas Rangers*, 492 F.3d 605, 613 (2007) (internal quotation marks omitted).

liams, the court held that a plaintiff must show a "materially adverse employment action" to establish actionable discrimination or retaliation, and that a "transfer involving no reduction in pay and no more than a minor change in working conditions" is not sufficient. 85 F.3d at 273-274. Petitioner attempts (Pet. 24) to show a conflict between *Williams* and other circuits by citing to *briefs* filed in other courts of appeals rather than decisions of those courts.[5]

In short, petitioner has failed to demonstrate a conflict between the holding of the court of appeals in its unpublished decision below and the holding of any other court of appeals or any decision of this Court with respect to his discrimination claim. Cf. Pet. App. 20a-21a (court of appeals notes that its standard is consistent with other courts of appeals and cites cases from eight other circuits). Nor has he demonstrated any post-*Burlington Northern* conflict with respect to retaliation claims or any reason why this Court should revisit *Burlington Northern* just a few Terms after it issued that decision. Moreover, the court of appeals' application of its legal standard to the circumstances of his case is a fact-bound determination that does not warrant this Court's review.[6]

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[5] The briefs cited by plaintiff were filed in cases that do not further his argument. In one case, the Eleventh Circuit affirmed the district court's judgment in a one-word, non-precedential decision. *Boykin* v. *City of Mobile*, 180 F.3d 271 (1999) (table). In the other case, the Third Circuit held that the denials of the plaintiff's transfer requests did *not* constitute a "materially adverse employment decision" sufficient to support his claim of discrimination. *Fallon* v. *Meissner*, 66 Fed. Appx. 348, 351-352 (2003).

[6] Even assuming *arguendo* that the court of appeals improperly determined that petitioner had failed to establish a prima facie case of

2. Petitioner further contends (Pet. 25-34) that this Court should grant certiorari to review the court of appeals' determination that he failed to establish a causal connection between his protected activity and the EEOC's denial of his requests for a transfer. In particular, petitioner argues (Pet. 27-30) that the court of appeals' decision conflicts with this Court's decisions in *Burlington Northern*; *Clark County School District* v. *Breeden*, 532 U.S. 268 (2001); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977); and *Wilkie* v. *Robbins*, 127 S. Ct. 2588 (2007). But none of those cases conflicts in any respect with the court of appeals' holding that, based on the summary judgment record in this case, petitioner failed to establish a causal connection between his protected activity and the EEOC's challenged conduct. As an initial matter neither *Mt. Healthy* nor *Wilkie* involved a retaliation claim under Title VII or any other federal anti-discrimination statute. In *Mt. Healthy*, the Court addressed claims under the First and Fourteenth Amendments. 429 U.S. at 276. And in *Wilkie*, this Court refused to infer from the Constitution a new cause of action for damages against government officials who retaliate

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discrimination, this case would be inappropriate for certiorari because the court of appeals' decision that the EEOC was entitled to summary judgment is correct on other grounds. As the district court properly held (Pet. App. 71a-73a), the EEOC advanced legitimate, non-discriminatory reasons for its actions, and petitioner failed to present evidence sufficient to raise a genuine issue of material fact with respect to any of the agency's proffered reasons. As the district court found, when petitioner applied for his transfers to the administrative judge position in Detroit, that position was not funded, and thus the EEOC could not fill it. And, with respect to the investigator position, the agency presented "substantial legitimate reasons for not granting [petitioner] that position," which petitioner failed to rebut. *Id.* at 71a-72a.

against the exercise of land-ownership rights. 127 S. Ct. at 2597-2605.

In *Burlington Northern*, this Court said nothing about the causation element of a prima facie case of retaliation; rather, its analysis was limited to determining what type of employer conduct constitutes actionable retaliation under Title VII. See 126 S. Ct. at 2412-2416.[7] And in *Clark County*, this Court, in holding that employer action taken 20 months after protected activity "suggests, by itself, no causality at all," observed that "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close." 532 U.S. at 273-274 (internal quotation marks and citation omitted). Thus, the only holding in *Clark County* is that 20 months is *not* sufficiently close to suggest causality.

Here, the court of appeals correctly ruled on the particular facts before it that petitioner failed to demonstrate any causal connection between the EEOC's denial of his request to transfer to Detroit and his engagement in protected activity; it did not purport to create a gen-

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[7] Petitioner's claim (Pet. 25-26) that the court of appeals "did not believe" that he "suffered an adverse employment action" under this Court's decision in *Burlington Northern* for purposes of his retaliation claim misunderstands the court's use of the phrase "assuming, *arguendo*," Pet. App. 25a. The court did not make any findings with respect to whether the denials of petitioner's transfer requests met the standard set forth in *Burlington Northern*, nor did it impose an "ultimate employment action" standard; to the contrary, the court assumed (without deciding) that petitioner had met *Burlington Northern*'s standard, and proceeded to decide the entirely separate issue of whether petitioner had met the causation element of a prima facie case of retaliation. *Ibid.*

eral rule that would govern other cases. Rather, the court's decision merely recognizes that an employment action that *pre-dates* protected activity cannot be retaliatory and thus, if an employer's challenged conduct (here, the continued denial of his requests for a transfer to Detroit) does not change after an employee files an EEO complaint, no causal connection can be inferred unless the employee provides evidence that retaliation motivated the challenged conduct that occurred after the protected activity. The court's fact-bound determination on causation, based on the record in this case, does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DAVIDSON MOMAH,

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NAOMI C. EARP, Chair, United States Equal Employment Opportunity Commission, and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

Page

INTRODUCTION 1

REASONS FOR GRANTING THE WRIT OF CERTIORARI 2

1. **A HARDSHIP TRANSFER THAT THE RESPONDENT ROUTINELY GRANTS AS A MATTER OF PRACTICE IS A MATERIAL TERMS, CONDITIONS, AND PRIVILEGES OF EMPLOYMENT. THEREFORE, THE DENIAL OF A HARDSHIP TRANSFER CONSTITUTES AN ADVERSE EMPLOYMENT ACTION.** 2

2. **THE SIXTH CIRCUIT COURT OF APPEALS INCORRECTLY HELD THAT RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT IN THIS TITLE VII RETALIATION CLAIM.** 7

CONCLUSION 13

APPENDIX

APPENDIX 1: Excerpts from Respondent's first motion to Dismiss filed January 14, 2003 ... 1a

APPENDIX 2: Excerpts from Mr. Andrew Sheppard's Dep 4a

TABLE OF AUTHORITIES

Page

CASES

Anderson v Liberty Lobby, 477 US. 242 (1986) . . . 8

Alvarado v. Texas Rangers,
492 F. 3d 605 (5th Cir. 2007) 4

Burlington Northern Santa Fe Railway Co. v. White,
126 S.Ct. 2405 (2006) . . . . . *passim*

Burlington Indus. v. Ellerth,
524 U.S. 742 (1998) 3

Celotex v. Catrett, 477 U.S. 317 (1986) 8

Clark County School District v. Shirley A. Breeden,
121 S.Ct. 1508 (2001) 1, 10

Hunt v. Cromartir,
526 U.S. 541 (552 U.S. 1999) 8

Marrero v. Goya of Puerto Rico, Inc.,
304 F. 3d 7 (1st Cir. 2002) 4, 5

Mt. Healthy City School District Board of Education v. Doyle,
429 U.S. 274 (1977) 1, 9

National Railroad Passenger v. Morgan,
122 S.Ct. 2061 (2002) 12

Piercy v. Maketa, 480 F. 3d 1192 (10th Cir. 2007) . 6

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 1, 7, 8

Simas v. First Citizens Federal Credit Union, 170 F. 3rd 37 (1st Cir. 1999) 5

Wilkie v. Robbins, 127 S.Ct 2588 (2007) 9

Walborn v. Erie County Care Facility, 150 F. 3d 584 (6th Cir. 1998) 10, 11

OTHER AUTHORITIES

Barbara Lindermann Schlei & Pual Grossman, Employment Discrimination Law (2nd ed. 1983) 10

New Webster's Dictionary of the English Language, Deluxe Encyclopedic Edition 13

Henry Campbell Black, Black's Law Dictionary with Pronunciation, (6th ed.) 13

INTRODUCTION

The Respondent's brief shows reason why the Court should vacate the Sixth Circuit Court of Appeals decision.

The decision of the Sixth Circuit Court of Appeals suggests that an employer is immune from liability for engaging in different treatment of similarly situated employees with respect to its terms, conditions, and privileges of employment, even if it frustrates statutory protected rights. Different courts of appeals have approached this issue differently. There is a need for uniformity.

The Sixth Circuit Court of Appeals declined to adopt the standard set forth by the Court in *Burlington Northern Santa Fe Railway v. Sheila White,* 126 S.Ct. 2405 (2006), *Mt. Health City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) and *Clark County School District v. Shirley A. Breeden*, 121 S.Ct. 1508 (2001), in deciding a retaliatory discrimination before granting summary judgment. In so doing, the Sixth Circuit of Appeals construed evidence in light most favorable to the Respondent. This violates this Court's decision in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. A HARDSHIP TRANSFER THAT THE RESPONDENT ROUTINELY GRANTS AS A MATTER OF PRACTICE IS A MATERIAL TERMS, CONDITIONS, AND PRIVILEGES OF EMPLOYMENT. HENCE, THE DENIAL OF A HARDSHIP TRANSFER CONSTITUTES AN ADVERSE EMPLOYMENT ACTION.

The Respondent asserts that as a matter of law the failure to effectuate a lateral transfer is not a personnel action sufficient to trigger the discrimination laws. In taking the above position, Respondent failed to distinguish what triggers a hardship transfer (medical reasons) and none hardship transfer. Without refuting whether a hardship transfer is part of the Respondent's policy and practice, Respondent coincides that it has a practice of granting hardship transfers. Instead, Respondent argues that the Sixth Circuit application of objective or materiality standard to adverse employment action is consistent with several other circuits.

While Respondent points out that most of the cases Petitioner cited deals with retaliatory discrimination, Respondent also acknowledges that "some courts of appeals used to apply the same adverse employment action standard" to substantive provision of Title VII discrimination cases while some (5th and 8th circuit courts) applied a different standard until *Burlington* decision. (Resp, p. 10, 13, 14). The Court in *Burlington Northern* rejected the court of appeals' application of

an ultimate employment action or objectivity standard method of analysis (employment status) in a retaliation case. The Court reaffirmed that the substantive provision of Title VII, Section 703(a) was designed to prevent injury terms, conditions and privileges of employment. 126 S.Ct. at 2410-12.

The *Burlington Northern* decision on substantive provision of Title VII is consistent with the Court's decision in *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). The Court noted that for an employment action to be actionable, the employer's action must cause a "significant change in employment status such as hiring,..., falling to promote, ..., or a decision causing a significant change in benefits."[1]

However, *Burlington Northern* arguably did not resolve the conflict among the circuits regarding the standard for an adverse employment action under the

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[1] The decision to deny Petitioner's hardship request to ***any position*** which is part of Respondent's practice resulted in a significant loss of the Petitioner's annual and sick leave, loss of locality pay, repeated questioning of leave usage to go to Detroit, placed on AWOL, reduction in salary because Petitioner had to utilize leave without pay to go to Michigan and take his daughter to hospital and to carry out the assignment imposed upon him the Oakland County court, extreme work related stress that would not occurred in Detroit made any position in Detroit more desirable because Petitioner could have adjusted his work schedule in order to accommodate the above needs, something he could not do while he was in Memphis or Indianapolis due to distance. Respondent's decision ***closed all opportunities for Petitioner to ever compete and work in Detroit in any position.***

substantive provision of Title VII. Respondent argued that Petitioner's reliance on the Ninth and First Circuits is misplaced because they dealt with retaliation cases. (Resp. P. 11). However, Respondent cited *Marrero v. Goya of Puerto Rico, Inc.*, 304 F. 3d 7(1st Cir. 2002), which dealt with a retaliation issue while discussing the substantive aspect of Title VII. The *Marrero* decision actually supports Petitioner's position. *Marrero* "rejected any bright line rule that a transfer cannot qualify as an adverse employment action' unless it results in a diminution in salary or a loss of benefits." *Id.* at 24.

Regarding denial of transfer being an adverse employment action, Respondent acknowledges that the standard for determining adverse employment action by both the Fifth and Eight Circuits (ultimate employment action), is in conflict with the standard used by the Sixth Circuit. (Resp. p. 14). Respondent argues that this conflict is of no benefit to Petitioner. ***Nevertheless, it is still a conflict***. The Fifth Circuit in *Alvarado v. Texas Rangers*, noted that a denial of transfer can be considered a "denial of promotion, if the position sought is objectively better, even if the new position would not have entailed an increase in pay..." *Alvarado v. Texas Rangers*, 492 F. 3d 605, 614 (5th Cir. 2007).

The Fifth circuit listed factors that it considered a measure of a true objectivity test which includes but not limited to increase in compensation or other tangible benefits. *Alvarado*, 492 F. 3d at 614. Based on the totality of the evidence presented before the Sixth Circuit including that Respondent ***closed all***

opportunities for Petitioner to ever compete and work in Detroit in any position, the Fifth Circuit is more likely to conclude that Petitioner showed that he suffered an adverse employment action.

Respondent cited *Simas v. First Citizens Federal Credit Union*, 170 F. 3rd 37 (1st Cir. 1999), to reiterate that the First Circuit's standard is in line with the Sixth Circuit objectivity test. *Simas* did not deal with the substantive provision of Title VII. *Simas* is applicable to the retaliation provision of Title VII. However, considering the Court's decision in *Burlington Northern*, *Simas* application to the retaliatory discrimination is misplaced.

If *Simas* and *Marrero* are to be applied to the substantive provision, a conflict exists among these circuits as to what constitutes an "objective test and materiality test." Under the Sixth Circuit, materiality test is whether a "change in the terms or conditions of employment is characterized by a decrease in wages, a less distinguished title, material loss of benefits..."[2] The First Circuit rejected the view "that a transfer cannot qualify as an adverse employment action unless it results in a diminution in salary or a loss of benefit." *Marrero*, 304 F. 3d at 24-25. The First circuit noted in *Simas* that materiality is determined on case by case basis cast in objective terms.

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[2] However, the Sixth Circuit provided no clear definition of what it means by "other indices that might be unique to a particular situation." Without a clear definition, the test implicates subjectivity test.

The Tenth circuit noted in *Piercy* that a "desired transfer" was not "a truly lateral transfer" if evidence shows that it would be less arduous and stressful than the plaintiff's current job and would increase the plaintiff's opportunity for obtaining additional job and leave flexibility." *Piercy v. Maketa*, 480 F. 3d 1192, 1205 (10th Cir. 2007) cited in *Beyer v. County of Nassau, et al*, Docket No. 06-4930-cv (2nd Cir. 2008). Hence, the Tenth Circuit concluded that denial of a lateral transfer could constitute an adverse employment action.

Therefore, even within the circuits that use the "materiality test and objectivity test" some conflict exist as to the true measure of the test without implicating subjectivity exist.

Respondent further argued that the court of appeal's decision in this case is "a fact-bound determination that does not warrant this court's review." (Resp. p. 16). Respondent suggests that the Court should not review 'a fact- bound case' even if the Sixth Circuit's application of its standard is contrary to the Court's standard. However, Respondent cited no authority that prohibits this Court from reviewing the case to ensure that lower courts are following the Court's legal standards in deciding the case.

Respondent further noted in its footnote "even assuming *arguendo* that the court of appeals improperly determined that petitioner had failed to establish a prima facie case of discrimination, this case would be inappropriate for certiorari because the court of appeals decision that the EEOC was entitled to

summary judgment is correct on other grounds." (Resp. 16). However, Respondent failed to cite what other ground the Sixth Circuit relied on in granting summary judgment in all the issues ***including those issues that Respondent intentionally refused to investigate and the Sixth Circuit did not address***.

In granting summary judgment to Respondent on its second motion for summary judgment, the district court violated this Court standard in *Reeves* by ***weighing and assessing credibility*** of the witnesses in light most favorable to Respondent in spite of credible records Petitioner presented to the district court and the Sixth circuit that showed that the reasons advanced by the Respondent were all false. (Pet. Rep. App. p.4a thru7a).

The Court's involvement is needed in order to bring a uniform interpretation of adverse employment action (denial of hardship transfer) under substantive provision of Title VII.

2. THE SIXTH CIRCUIT COURT OF APPEALS INCORRECTLY HELD THAT RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT IN THIS TITLE VII RETALIATION CLAIM.

The Court held in *Reeves,* that a district court violates this Court standard of summary judgment if it ***weighs and assesses credibility*** of the witnesses and the parties in light most favorable to the moving party. And that ***weighing and assessment of credibility*** is a duty that belongs to the jury.

The Court noted:

> Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe... That is the court should give credence to the evidence favoring the non movant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 152 (2000). Also see *Hunt v. Cromaritie,* 119 S.Ct. at 1551-2 (1999); *Anderson v Liberty Lobby*, 477 US. 242, 248 (1986); and *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986).

The Respondent contends that the Sixth Circuit granted summary judgment based on the record. (Resp. Res, p. 16). Respondent's position did not show why the Sixth Circuit suggested in its previous decision that retaliation claims failed for lack of adverse employment action and not causation, even without reviewing several timely raised claims that were not related to transfer that Respondent refused to investigate.[3] However, if the Sixth Circuit had weighted and assessed the evidence such as pleading, depositions, answers to interrogatories, affidavits

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[3] Ironically, Respondent failed to note that during its first motion to dismiss, its attorneys advised the district court that some issues need to be resolved at a trial. (Pet. Rep. App. 1a thru 3a).

along with other exhibits, as a whole in light most favorable to Petitioner, it would have discredited Respondent's explanation for its conduct as not believable. (Pet. Rep. App. 4a-7a).

The Respondent further contends that *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977); and *Wilkie v. Robbins,* 127 S.Ct 2588 (2007) involved non-Title VII cases, Respondent cited no authority that shows that the Court is bound only by Title VII cases while determining Title VII causation. In any event, Respondent's argument supports Petitioner's use of the motivating or substantial factor test standard set forth by this Court in *Mt. Healthy* and *Wilkie* in determining Title VII causation. Respondent argues that for the Petitioner to show causation, he must show that retaliation motivated Respondent's subsequent actions. (Resp. Res. p. 18). The Respondent concedes that the Sixth Circuit did not frame its standard in terms of motivating or substantial factor. Neither did it evaluate the records in order to determine the motivating or substantial factor and the proximity of events before rejecting the causation issue.

The four ways of showing causation (motivating or substantial factor and Proximity of Events) are:

(1) Evidence that after learning of the opposition, the employer treated the employee differently from similarly situated nonprotected employee;
(2) Evidence that after learning of the opposition, the employer treated the

Employee differently than before the protected activity, including evidence that the employer began surveillance;

(3) Closeness in time between the employer's knowledge of the protected opposition or participation and the adverse activity; and

(4) attempts to conceal the fact that the person who decided on the adverse action knew at that time the employee had engaged in protected participation or opposition.

See Barbara Lindermann Schlei & Pual Grossman, *Employment Discrimination Law*, p. 558-9 (2nd ed. 1983); *Clark County School District*, 121 S.Ct at 1511.

Respondent contends that *Burlington Northern* is not applicable to the causation. Respondent is incorrect. Causation would not be determined in the absence of an adverse employment action. The Court recognized this when it noted that "***the significance of any given act of retaliation will often depend upon the particular circumstances***." *Burlington Northern*, 126 S.Ct. at 2415. *Burlington Northern* ***requires a court to look a the full context of an employer's action and its impact on the employee***. *Id* at 2412-13, 2417. Hence, *Burlington Northern* is applicable to Title VII causation issue.

Under *Burlington Northern*, an evaluation of the particular circumstances would help in determining the above mentioned four ways of determining if causation exist, and not the ***Walborn v. Erie County***

Care Facility, 150 F. 3d 584, 589 (6th Cir. 1998) standard which was decided before Burlington Northern. If Walborn is allowed to stand, it would undermine this Court standard on causation.

In order to justify the Sixth Circuit application of *Walborn*, Respondent argued that employment action that pre-dates protected activity cannot be retaliatory and if continued after the filing of an EEO complaint, does not show causation. (Resp. p. 18). The Petitioner's contention is that the Sixth Circuit ***summarily*** disregarded the informal EEO complaints that Petitioner brought to Respondent's attention including an opposition to Mr. Walt Grabon's requiring Petitioner to stay and assist Judge Barbara Kimmelman, white female, as a prerequisite for gaining a hardship transfer prior to 1999 formal EEO complaint. ***Furthermore, the Sixth Circuit disregarded all the formal EEO complaints filed within weeks after 1999 that did not relate to a hardship transfer without following this Court standards in Burlington Northern, Clark, Mt. Healthy, and Wilkie in determining causation.***

In any event, Respondent failed to answer critical questions such as: (1) why did Mr. Grabon who had asked Petitioner to give him six months suddenly change his position and tell Petitioner to get his grant for a transfer request from Washington DC? (2) What happened in Washington DC to make Mr. Soto, Ms. Thornton and Mr. Grabon so angry with Petitioner which resulted in a ***flat-out*** denial of Petitioner's request within three weeks of visiting Washington DC?

(3)What prompted Mr. Grabon to tell Petitioner "***filing an EEO complaint is like falling off the wagon***"?(4)Why did Mr. Neely who had told Petitioner that he was not involved in granting transfers suddenly become involved and turn against the Petitioner? (6) What made Mr. Neely comment about him and Mr. Grabon sharing a few stories about the Petitioner? (7) Why was Petitioner who had an excellent performance record suddenly denied promotions and selections to several positions with the Respondent?, among others

The fact that the Petitioner did not proceed with a formal complaint for the denial of his hardship transfer in 1998, does not make his informal EEO complaints about denial of transfer and opposition to Mr. Grabon's decision a non protected EEO activity.

While Petitioner cannot recover damages for an untimely filed complaint, untimely complaints are admissible as evidence, to show that retaliation was a substantial or motivating factor in the subsequent treatment receive by Petitioner. *National Railroad Passenger v. Morgan*, 122 S.Ct. 2061, 2072 (2002). ***All the non-EEO employees*** similarly situated, received better treatment.

The Sixth Circuit erred by failing to follow neither the Court's proximity standard nor substantial nor motivating factor test in determining causation.

Respondent stated in its footnote that Petitioner "misunderstands the court's use of the phrase "assuming arguendo." Petitioner did not

misunderstand the phrase 'assuming arguendo'. Assume means "suppose as a fact; pretend; or put on deceitfully". Arguendo means "arguing or in the course of the argument." *New Webster's Dictionary of the English Language, Deluxe Encyclopedic Edition; Black's Law Dictionary with Pronunciation, 6th ed.* The Sixth Circuit noted that "assuming arguendo", meaning that if it were to ***assume, pretend, or suppose*** for the sake of argument that an adverse employment action standard has been met. The Sixth Circuit's assumption shows that it did not believe that Petitioner had met the prima facie for adverse employment. This suggests that Petitioner has to show employment connected status in order to establish an adverse employment action. This is contrary to the decision in *Burlington Northern*.

Finally, Respondent provided no set of facts or legal standard that the Sixth Circuit relied on in dismissing subsequent EEO complaints that Respondent refused to investigate though the claims were timely raised before the Respondent's EEO office and the district court.

CONCLUSION

Based on the foregoing reasons, Petitioner prays this Court to grant his petition for certiorari and remand the case to the district court for trial. However, if the Court determines in its infinite wisdom that there is no adverse employment action based on the denial of a hardship transfer, to remand the retaliation claim to the district court for trial or the subsequent complaints that the Sixth circuit

would not address back to the Respondent for counseling and investigation. This would prevent a proper case of discrimination from being disposed of on summary judgment.

Respectfully submitted,

Davidson Momah, Pro-se
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APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 02-73504

[Dated January 14, 2003]

DAVIDSON MOMAH,	)
	)
Plaintiff,	)
	)
v.	)
	)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
	)
Defendant.	)
	)

MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE
ANNA DIGGS TAYLOR
United States District Judge
858 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Monday, January 14, 2003

APPEARANCES:

RICKIE E. IBE
29201 Telegraph Road
Southfield, MI 48034
On behalf of the Plaintiff.

PETER A. CAPLAN
United States Attorneys Office
211 West Fort Street
Detroit, MI 48226
On behalf of the Defendant.

LORI KLINE:
On behalf of the EEOC.

REPORTED STENOGRAPHICALLY BY:
CAROL S. SAPALA, RPR-CM

* * *

[p. 6]

Motion for Summary Judgment

Mr. Momah's complaint, the most prevalent claim that he has is that he was denied a reassignment to the city of his choice. And by way of background and this is all taken from the complaint.

THE COURT: Wait a moment.

Are you moving to dismiss all of his allegations under Title VII?

MS. KLINE: No, no, no. Our motion was for partial dismissal of certain claims.

THE COURT: Certain allegation which are part of claims?

MS. KLINE: Exactly.

THE COURT: All right. Go ahead.

MS. KLINE: And although we believe the gravamen of this compliant and how it all started was Mr. Momah's contention that he was unfairly denied his transfer request to other — lateral transfer request to other cities and based on Mr. Momah's recount in his complaint his emploiyment history.

He states that he began his work in the Detroit district office that by his own volition, he applied for and accepted a transfer to the Memphis District Office, which he subsequently went to Memphis, and, I guess, in the process, I think he can confirm in the complaint he left his family behind in Detroit.

* * *

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 02-73504

[Dated April 25, 2003]

DAVIDSON MOMAH,

Plaintiff,

-vs-

CARI M. DOMINGUEZ, CHAIR, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

The deposition of ANDREW J. SHEPPARD taken before me, Sheila D. Rice, CSR-4163, a Notary Public within and for the County of Wayne (acting in Oakland), State of Michigan, at 29201 Telegraph Road, Suite 510, Southfield, Michigan, on Friday, April 25, 2003.

APPEARANCES:

RICKIE E. IBE, P.C.
29201 Telegraph Road, Suite 510
Southfield, Michigan 48034-7648
(By Rickie E. Ibe, Esq.),

Appearing on behalf of the Plaintiff.

UNITED STATES ATTORNEYS OFFICE
211 West Fort Street, Suite 2001
Detroit, Michigan 48226-3211
(By Peter A. Caplan, Esq.),

Appearing on behalf of the Defendants.

* * *

[p. 16]

A: As I said, I remember Jim was coming in about the time I think that Davidson was leaving, around that time. So I couldn't dispute it.

Q: Okay. Do you know if anyone ever filed any objections regarding Judge Momah receiving the judgeship position in the Memphis District?

A: None that I'm aware of.

Q: Sir, do you know what a hardship transfer is?

A: Yes.

Q: If you don't mind, sir, could you please tell us what a hardship transfer is?

A: If an employee in a district office has a situation either in their immediate family or some type of personal situation, they can apply for a hardship transfer to a different office. And they apply – you know, they apply for it and if it's possible if there's a position open it's normally approved. Yeah.

Q: And also, sir, could you tell us do you know what a funding of a position would have meant, funding for a position, or a funded position?

A: I'm not a hundred percent sure. A funded position?

Q: Yes. Is there such thing as a funded position, a position that requires funding?

[p. 17]

A: All positions require funding. Some are permanent, some can be temporary positions.

Q: Okay. Does funding of the position, is that something that is used for new positions or for existing positions?

A: I'm not sure how you're using the term. Each office is allowed so many positions. Sometimes we have – we've been given – we were given the authority to hire temporary positions, but if it's a funded position –

In other words, the way we use the term was each office has so many positions. Those are your positions. So if those positions are on your books, you're allowed to fill those positions. The only exception is if there's a freeze on hiring or something like that. If there's a freeze, you can't fill them, but in certain situations they'll lift a freeze if an office has a need.

Q: Okay. In times of hardship, when someone makes a hardship transfer, a request for hardship transfer, and let's assume hypothetically there's a position that is open, does it require funding authorization to fill that hardship transfer request?

A: If the position is there, you can fill it. You're allowed to fill it.

* * *